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1123

No. 3072

United States
Circuit Court of Appeals
For the Ninth Circuit.

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.


FILED

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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F. D. MONCKTON,

CLERK



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Plaintiff in Error,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff complains of the defendant, and for
cause of action alleges:

I.

That the plaintiff, United States of America, is a
corporation sovereign.

II.

That the defendant, Illinois Surety Company, is
a foreign corporation duly organized and existing
under and by virtue of the laws of the State of
Illinois, and duly and regularly authorized, pursu-
ant to the laws of the State of California, to trans-
act business within the said State of California.

III.

That on the 4th day of November, 1911, one Pierre
Grazi, the proprietor of a theatrical exhibition and
a person emigrating to the United States from a
foreign country, to wit, France, imported and
brought with him into the port and collection dis-
trict of New York, State of New York, certain im-
plements of his trade or profession, to wit, theat-
rical effects contained in three chests, 63 trunks, 76

cases, 13 baskets, 9 boxes, 6 bundles, 3 valises and 10 hampers. [1*]

IV.

That thereafter, the said theatrical goods and effects so imported as aforesaid, were, on the said 4th day of November, 1911, brought by the said Pierre Grazi under an immediate transportation order, from the said port of New York in the State of New York, to the port of San Francisco, in the State and Northern District of California, and thereafter, and thereupon, and on the 11th day of November, 1911, the said goods and effects were, by said Pierre Grazi, entered at the port and collection district of San Francisco in the State and Northern District of California, under consumption entry No. 15,888.

V.

That the said goods and effects so imported as aforesaid, were duly appraised according to law, and the value fixed at \$15,558. That the amount of duty thereon calculated according to law was \$9,726.

VI.

That the said Pierre Grazi, desiring to take the benefit of section 656 of an Act of the United States entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States and for other purposes," approved August 5th, 1909, did, on said 11th day of November, 1911, make, execute and deliver to the United States of America, with the defendant as surety thereon, that

*Page-number appearing at foot of page of original certified Transcript of Record.

certain bond for redelivery, in the words and figures following, to wit: [2]

3000.00

6000.00

158

BOND FOR REDELIVERY.

This bond to be used for all purposes of importation of articles that are to be exported within six months, under Sections 2505, 2511, 2512 and 3021, Revised Statutes.

KNOW ALL MEN BY THESE PRESENTS:
That we, Pierre Grazi as principals, and —— as sureties, are bound unto the United States of America in the sum of Six Thousand Dollars, to be paid to the United States; for the payment whereof we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 11th day of November, nineteen hundred and eleven.

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above-bounden principals, or either of them, or either of their heirs, executors, administrators, or assigns, shall within six months, to be computed from the date of the importation of the Theatrical Effects hereinafter mentioned, imported by Pierre Grazi in the So. Pc. Company, from New York consisting of

Pierre Grazi	3 chests	
	63 trunks	
	76 cases.	
	13 baskets	Personal effects,
	9 boxes	Manf. Cotton,
	6 bundles	Silk, &c.
	3 valises	
	10 hampers.	

Entry 15888

for redelivery, under the provisions of section —, Revised Statutes of the United States, redeliver the same to the Collector of San Francisco, the port of its importation, after its use for export, and furnish such proof of its identity as the Secretary of the Treasury by regulation may require; and shall enter the said effects for exportation from the United States within said six months, in the manner prescribed by law and the [3] Regulations of the Treasury Department, then this obligation will be void; otherwise, to remain in full force and virtue.

(Signed) PIERRE GRAZI. (Seal)

ILLINOIS SURETY COMPANY. (Seal)

[Corporate Seal]

By CHARLES T. HUGHES, (Seal)

Its Attorney in Fact.

Sealed and delivered in presence of

(Signed) THOS. W. SCOTT.

Penalty of this bond will be double the appraised value of the merchandise.

Here insert description of articles, and statements of value, as contained in the entry.

[Endorsed as follows]:

“Surety consents to 6 months extension.

ILLINOIS SURETY COMPANY.

By CHARLES T. HUGHES,

Its Attorney in Fact.” [4]

VII.

That on the faith of said bond so executed and delivered as aforesaid, the said Pierre Grazi was allowed to receive, and he did on or about the 11th day of November, 1911, receive the said goods and theatrical effects above referred to, and the whole thereof.

VIII.

That on or about the first day of May, 1912, and during the time allowed by law in such case, the said Pierre Grazi delivered, and caused to be delivered, for exportation pursuant to said bond for redelivery as aforesaid, a portion of said goods and effects, the duty upon which, calculated upon said appraised value, was \$3,617.34 and no more.

IX.

That more than three years have elapsed since the execution of said bond, and the said goods and theatrical effects have not, nor have any of them, except as hereinabove stated, been exported or delivered to the Collector of Customs for the port and collection district of San Francisco or elsewhere, for the purpose of exportation. That the time allowed by law for said delivery for exportation has long since elapsed.

X.

That the sum of \$6,108.66, the duty on that por-

tion of said goods not exported or delivered for exportations above set forth, has not been paid, nor any part thereof.

XI.

That on the 9th day of January, 1915, and at divers other times both before and after said date, the plaintiff demanded of the defendant the full penalty of said bond in satisfaction of its demand as hereinabove set forth, but the defendant then and there [5] refused, and ever since has refused, and now refuses to pay the said penalty of said bond, or any part thereof.

WHEREFORE, plaintiff demands judgment against the defendant for the penalty of said bond, to wit, the sum of \$6,108.66 (six thousand one hundred and eight dollars and sixty-six cents), together with lawful interest thereon from and after January 9th, 1915, together with costs of suit.

JNO. W. PRESTON,
United States Attorney,
Attorney for Plaintiff.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

John W. Preston, being first duly sworn, deposes and says: That he is the United States Attorney for the Northern District of California; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters, he believes it to be true.

JOHN W. PRESTON.

Subscribed and sworn to before me this 19th day of April, 1915.

[Seal]

J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Apr. 19, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,
Defendant.

Amended Demurrer to Complaint.

Now comes the defendant, and demurring to the complaint on file in this action for grounds of demurrer, alleges as follows:

I.

That the said complaint does not state facts sufficient to constitute a cause of action against said defendant.

II.

That the said complaint is uncertain in this, that it cannot be ascertained therefrom what the value of the goods imported from France by Pierre Grazi, mentioned in the said complaint, was, in that the

bond set forth in the said complaint is for Six Thousand (\$6,000.00) Dollars, and purports to be for double the appraised value of the merchandise therein mentioned, while in Paragraph V of the said complaint, it is alleged that said goods were appraised and the value fixed at Fifteen Thousand Five Hundred Fifty-eight (\$15,558.00) Dollars, and that the amount of duty thereon calculated according to law was \$97.26.

III.

That the said complaint is ambiguous for the same reason that it is uncertain.

IV.

That the said complaint is unintelligible for the same [7] reasons that it is uncertain and ambiguous.

WHEREFORE defendant, having fully answered, prays to be dismissed with its costs.

T. C. WEST,
CHAS. H. FAIRALL,
Attorneys for Defendant.

I hereby certify that the above demurrer, in my opinion, is well taken and the same is not interposed for purposes of delay.

T. C. WEST,
Atty. for Deft.

Service of a copy hereof admitted June 14, 1915.

JNO. W. PRESTON,
Atty. for Plff.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

At a stated term, to wit, the July term, A. D. 1915, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,878.

UNITED STATES OF AMERICA

vs.

ILLINOIS SURETY CO.

**Minutes of Court—September 20, 1915—Order
Overruling Demurrer, etc.**

Defendants amended demurrer to the complaint came on to be heard and after arguments being submitted and fully considered, it was ordered that said amended demurrer be and the same is hereby overruled with leave to answer in twenty days. [9]

At a stated term, to wit, the November term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 6th day of February, in the year

of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court.

No. 15,878.

UNITED STATES OF AMERICA

vs.

ILLINOIS SURETY CO.

**Minutes of Court — February 6, 1917 — Order
Allowing Defendant to File Amendment, etc.**

* * * * *

Upon motion of Mr. West it was ordered that defendant may file an amendment to its amended answer.

* * * * *

[10]

(Title of Court and Cause.)

Second Amended Answer.

Now comes the defendant, Illinois Surety Company, a corporation, and with leave of the Court first had and obtained, files this its second amended answer to the complaint on file herein, and denies, admits and alleges as follows:

I.

In answer to paragraph III of the complaint, defendant admits that one Pierre Grazi caused to be imported certain theatrical effects in the port and collection district of San Francisco, but this defend-

ant having no knowledge, information or belief sufficient to enable it to answer, denies that said Grazi imported and brought with him or imported or brought with him into the port and collection district of New York or brought with him in any port or collection district of the United States, except as hereinbefore admitted, the theatrical effects mentioned in the complaint or that said theatrical effects were contained in three chests, sixty-three trunks, seventy-six cases, thirteen baskets, nine boxes, six bundles, three valises and ten hampers, but avers that the theatrical effects which the defendant admits to have been imported by said Pierre Grazi were entered by said Pierre Grazi in the port and collection district of San Francisco and there and then so entered, imported, valued and estimated and appraised in the presence of the plaintiff and defendant at the sum of Five Thousand (\$5,000) Dollars, and no more.

II.

This defendant has no knowledge, information or belief sufficient to enable it to answer paragraph IV of the complaint and placing its denial upon that ground, denies that said theatrical goods and effects were imported otherwise than by defendant specifically admitted in the preceding paragraph, and further [11] denies that they were brought by the said Pierre Grazi under an immediate transportation order from the port of New York or brought at all by him, the said Pierre Grazi, to the port of San Francisco.

III.

The defendant denies that the said goods and ef-

fects were imported as set forth in the plaintiff's complaint, but avers that they were imported as by his answer specifically alleged and further avers that said goods were appraised as alleged in paragraph I of this answer, the same being according to law, and the defendant denies that the value thereof was fixed at the sum of Fifteen Thousand Five Hundred Fifty-eight (\$15,558) Dollars, as alleged in paragraph V of said complaint, or at any sum larger than the said sum of Five Thousand (\$5,000.00) Dollars, as aforesaid, and denies that the amount of duty thereon calculated according to law, or at all, was Nine Thousand Seven Hundred Twenty-six (\$9,726.00) Dollars, or any further or greater sum than the legal duty would be upon said estimated and appraised value of said goods, to wit, Three Thousand (\$3,000.00) Dollars.

IV.

In answer to paragraph VI of the complaint, defendant admits that it executed as surety the bond therein set forth, but denies that said bond was delivered as alleged or at all, and avers that said bond is null and void and of no force and effect.

V.

Answering paragraph VII of the plaintiff's complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer and placing its denial on that ground, denies that the said Pierre Grazi was allowed to receive, or did receive, the said goods and theatrical effects on the faith of said bond of the defendant.

VI.

In answer to paragraph X of the complaint defendant has no [12] knowledge, information or belief sufficient to enable it to answer and placing its denial on that ground, denies that the sum of Six Thousand One Hundred Eight Dollars and Sixty-six cents (\$6,108.66) was or is the duty on that portion of said goods not exported or delivered for exportation as set forth in said Complaint and denies that the defendant is liable for the sum of Six Thousand One Hundred Eight Dollars and Sixty-six Cents (\$6,108.66), or any sum whatever, and denies that any part or portion of said sum or the whole thereof is due, owing and unpaid by the defendant to the plaintiff.

VII.

Said defendant alleges that before the said bond mentioned in said complaint was given and executed, the goods had been duly appraised upon true valuation and after execution of the bond said goods were then and there duly delivered to the said Pierre Grazi, but thereafter the said plaintiff, without any notice to the defendant, and without his knowledge or consent proceeded to and did purport to make an unlawful, false and fictitious reappraisal and revaluation of said theatrical goods and effects and reappraised and revalued same at sum far exceeding their true value and their true appraisement and at a sum far in excess of the amount mentioned in said bond as being their true value as duly appraised, and defendant further alleges that had the said

goods and effects been appraised or valued, to the knowledge of the defendant herein at any larger sum than that mentioned in said bond, to wit, the sum of Five Thousand (\$5,000.00) Dollars, the said defendant would not have executed the said bond or allowed the said goods and effects to be delivered to the said Grazi on the faith of and under the security of said bond.

VIII.

This defendant further alleges that the bond given and executed by it was not so given and executed for the goods mentioned [13] in paragraph V of the plaintiff's complaint, but was in fact and in truth given for the goods mentioned in the said bond.

IX.

This defendant now further alleges that the goods and theatrical effects returned and delivered by the said Pierre Grazi were the goods and theatrical effects covered by the defendant's bond and the value of said goods and the lawful duties thereupon were equal in amount and the full amount of the value and the duties that could lawfully have been chargeable and levied upon all of the goods and theatrical effects mentioned in said bond of said defendant, and which were so entered, valued and appraised and so imported by the said Pierre Grazi as aforesaid under said bond.

X.

This defendant further avers that the alleged cause of action attempted to be set forth in the said complaint is barred by the provisions of the act of Con-

gress of June, 1874, Section 22, Federal Statutes Annotated, Vol. 2, page 761.

And for a second and further defense and in answer to the plaintiffs complaint on file herein, the defendant alleges:

I.

In answer to paragraph III of the complaint defendant admits that one Pierre Grazi caused to be imported certain theatrical effects in the port and collection district of San Francisco, but this defendant having no knowledge, information or belief sufficient to enable it to answer, denies that; said Grazi imported and brought with him or imported or brought with him into the port and collection district of New York, or brought with him in any port or collection district of the United States, except as hereinbefore admitted, the theatrical effects mentioned in the complaint or that said theatrical effects were contained in Three Chests, Sixty-three Trunks, Seventy-six Cases, Thirteen Baskets, Nine Boxes, Six Bundles, Three Valises and Ten Hampers, [14] but avers that the theatrical effects which the defendant admits to have been imported by said Pierre Grazi were entered by said Pierre Grazi in the port and collection district of San Francisco, and there and then so entered, imported, valued, estimated and appraised in the presence of the plaintiff and the defendant at the sum of Five Thousand (\$5,000.00) Dollars, and no more.

II.

This defendant has no knowledge, information or

belief sufficient to enable it to answer paragraph IV of the complaint and placing its denial upon that ground, denies that said theatrical goods and effects were imported otherwise than by defendant specifically admitted in the preceding paragraph and further denies that they were brought by the said Pierre Grazi under an immediate transportation order from the port of New York or brought at all by him, the said Pierre Grazi, to the port of San Francisco.

III.

The defendant denies that the said goods and effects were imported as set forth in plaintiff's complaint, but avers that they were imported as by his answer specifically alleged, and further avers that said goods were appraised as alleged in paragraph I of this answer, the same being according to law, and defendant denies that the value thereof was fixed at Fifteen Thousand Five Hundred Fifty-eight (\$15,558.00) Dollars, as alleged in paragraph V of said complaint, or at any larger sum than the sum of Five Thousand (\$5,000.00) Dollars, as aforesaid, and denies that the amount of duty thereon calculated according to law, or at all, was Nine Thousand Seven Hundred and Twenty-six (\$9,726.00) Dollars, or any further or greater sum than the legal duty would be upon said estimated appraised value of said goods, to wit, Three Thousand (\$3,000.00).

IV.

In answer to paragraph VI of the complaint, defendant admits [15] that it executed as surety the bond therein set forth, but denies that said bond

was delivered as alleged or at all and avers that said bond is null and void and of no force and effect.

V.

Answering paragraph VII of the plaintiff's complaint, this defendant has no information, knowledge or belief sufficient to enable it to answer and placing its denial on that ground, denies that the said Pierre Grazi was allowed to receive or did receive, on or about the 11th day of November, 1911, the said goods and theatrical effects on the faith of the said bond of the defendant.

VI.

In answer to paragraph X of complaint defendant has no knowledge, information or belief sufficient to enable it to answer and placing its denial upon that ground denies that the sum of Six Thousand One Hundred and Eight Dollars and Sixty-six Cents (\$6,108.66), was or is the duty on that portion of said goods not exported or delivered for exportation as set forth in said complaint and denies that defendant is liable for the sum of Six Thousand One Hundred Eight Dollars and Sixty-six Cents (\$6,108.66), or any sum whatever and denies that any part or portion of said sum or the whole thereof is due, owing and unpaid by the defendant to the plaintiff.

VII.

Defendant alleges that it made and executed the bond mentioned in said complaint upon the express agreement between all parties thereto and upon the representations of plaintiff and principal Grazi that

the goods had been theretofore lawfully entered, valued and appraised under and in compliance with the provisions, rules and regulations governing Custom Duties and particularly of the act of Congress, Chap. 6, of 1909, known as the Tariff Act of 1909, and more particularly of sub-section 656 thereof, mentioned in paragraph VI of plaintiff's complaint, and defendant [16] further avers that if the said goods were not so lawfully entered and truly valued and appraised it, the said defendant did not know it, but the said plaintiff required full knowledge before their delivery by said plaintiff to said Grazi, that they had been unlawfully entered and unlawfully undervalued and underappraised to the extent of the difference of Three Hundred (300) per centum. That said plaintiff had there and then full knowledge that said bond was not made and executed to cover, nor did it cover, any such excess of valuation, or appraisement and that this defendant had no knowledge or notice thereof and did not consent thereto and that notwithstanding said plaintiff thereafter, without notice to the defendant, and without his consent, and unbeknown to him delivered said goods and effects in part to said Grazi, and in part to other parties, to the defendant unknown.

VIII.

This defendant further alleges that the bond given and executed by the defendant was not so given and executed for the goods mentioned in paragraph V of the plaintiff's complaint, but was in fact and in truth given for the goods mentioned in said bond.

IX.

This defendant further alleges that the goods and theatrical effects returned and delivered by the said Pierre Grazi to the plaintiff were the goods and theatrical effects covered by the defendant's bond and the value of said goods and the lawful duties thereupon were equal in amount and the full amount of the value and duties that could lawfully have been chargeable and levied upon all of the goods and theatrical effects mentioned in said bond of said defendant and which were so entered, valued and appraised and so imported by the said Pierre Grazi as aforesaid under said bond. [17]

X.

This defendant further avers that the alleged cause of action attempted to be set forth in the said complaint is barred by the provisions of the act of Congress of June, 1874, section 22, Federal Statutes Annotated, Vol. 2, page 761.

AND for a further separate and third defense in answer to plaintiff's complaint, leave of the Court being first had and obtained by the defendant during the trial of the cause, to make and file the said defense, the defendant alleges:

I.

Denies each and every allegation contained in paragraph III of plaintiff's complaint.

II.

Denies each and every allegation contained in paragraph IV of plaintiff's complaint, save and except that on the 11th day of November, 1911, said

Pierre Grazi entered at the port and collection district of San Francisco, in the State and Northern District of California, under Entry No. 15,888, certain goods valued at Five Thousand (\$5,000.00) Dollars, upon which the duty was estimated at Three Thousand (\$3,000.00) Dollars, but alleges that said entry was a warehouse entry.

III.

Denies each and every allegation contained in paragraph V of the plaintiff's complaint.

IV.

Defendant admits that he signed the bond set forth in plaintiff's complaint, but avers that the plaintiff did materially modify and alter the conditions of said bond with and in favor of said Pierre Grazi and without the express assent of this defendant in that said plaintiff did, without the assent of the defendant, as aforesaid, give and grant to said Grazi a second and further extension of six months for the redelivery and exportation of the goods and effects in said bond mentioned. [18]

V.

Denies each and every allegation contained in paragraph VII of plaintiff's complaint.

VI.

Denies each and every allegation contained in paragraph IX of plaintiff's complaint save and except that more than three years have elapsed since the execution of said bond.

VII.

Denies each and every allegation contained in

paragraph X of plaintiff's complaint.

WHEREFORE, the defendant having fully answered, prays to be hence dismissed with its costs.

T. C. WEST,

FERNAND de JOURNEL,

Attorneys for Defendant.

State of California,

City and County of San Francisco,—ss.

T. C. West, being duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated upon his information and belief, and as to those matters he believes the same to be true. This verification is made by this affiant for the reason that the head office of the defendant corporation is outside of the county in which this affiant has his office, to wit, in the city of Chicago, State of Illinois, while the office of this affiant is in the City and County of San Francisco, State of California.

T. C. WEST.

Subscribed and sworn to before me, this 10th day of February, 1917.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [19]

Service of a copy of the within Second Amended

Answer is hereby admitted the 10th day of Feb., 1917.

JNO. W. PRESTON,
Assistant United States Atty.

[Endorsed]: Filed Feb. 10, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

(Title of Court and Cause.)

Judgment.

This cause having come on regularly for trial upon the 6th day of February, A. D. 1917, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties, Ed. F. Jared, Assistant United States Attorney, appearing on behalf of the plaintiff, and T. C. West and F. De Journal, Esqrs., appearing on behalf of the defendant; and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having filed its memorandum opinion and ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of \$6,000.00, together with interest at seven per cent per annum from April 19, 1915, and for costs:

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that United States of America, plaintiff, do have and recover of and from Illinois Surety

Company, a corporation, defendant, the sum of Six Thousand Seven Hundred Ninety-eight and no/100 (\$6,798.00) Dollars, together with its costs herein expended taxed at \$29.10.

Judgment entered March 13, 1917.

WALTER B. MALING,

Clerk.

A true copy. ATTEST:

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: Filed Mar. 13, 1917. Walter B. Mal-
ing, Clerk. [21]

*In the Southern Division of the United States
District Court, for the Northern District of
California, Second Division.*

No. 15,878.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,
Defendant.

Memorandum on Merits.

RUDKIN, District Judge.

This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi, conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the collector of the port of San

Francisco, and enter the same for exportation from the United States within six months from the date of importation.

It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel, that such properties arrived in the port and collection district of New York, in the State of New York, on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of \$5,000.

For reasons not entirely clear from the record, two bonds were executed to the Government at that time, by the importer, Grazi, and the defendant company. The first for \$10,000, under [22] section 2899 of the Revised Statutes, which provides that the collector may, at the request of the owner, importer, consignee or agent, take bonds with approved security in double the estimated value of the merchandise imported, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The second for \$6,000, under paragraph 656 of the Tariff Act of August 5, 1909 (Fed. Statutes, Annotated, Supp. 1909, page 794), which provides as follows:

“Professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of arrival, of persons emigrating to the United States; but this exception shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons or for sale, nor shall it be construed to include theatrical scenery, properties and apparel; but such articles brought by the proprietors or manager of theatrical exhibitions arriving from abroad, for temporary use by them in such exhibitions, and not for any other person, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment of the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation; Provided, that the Secretary of the Treasury may, in his discretion, extend such period for a further term of six months in case application shall be made therefor.”

After entry, the goods were appraised according to law and the valuation fixed at \$15,558. The duty thereon computed according to law was \$9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof of the ap-

praised value of \$3,617.34 were delivered to the Collector and exported; but the balance of the goods, subject to a duty of \$6,108.66, have never been exported from the United States or delivered over for exportation. [23]

Although there is little controversy over the material facts, numerous defenses were interposed at the trial of which brief reference will be made.

It is first contended that the existence of the other bond in the sum of \$10,000 given under section 2899 of the Revised Statutes avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was taken. That bond is only required where goods are delivered to the consignee pending inspection and appraisalment. Here, there was no delivery of the goods to the consignee until delivery was made under the bonds in suit, so that the former bond never became operative, never served any purpose, and cannot defeat the present action.

Again, it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless, they were so admitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again, it is claimed that the Government should have forfeited the goods for undervaluation. But I apprehend the right of forfeiture was given for the protection of the Government, and not for the protec-

tion of the importer or his surety.

It is suggested that the goods were not delivered to Grazi, but to members of the troupe. The delivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe with his consent and acquiescence was equivalent to a delivery to him.

It is claimed that the surety was released by an unauthorized extension of the time for exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. [24] The only evidence of such extension is a notation on the face of the bond made some time after its execution, but by whom or when made, is not disclosed. The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter.

Some complaint is made as to the manner in which

the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it effected the substantial rights of the parties.

As already stated, the bond is not conditioned as required by law, as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in the United States vs. Dickerhoff, 202 U. S. 302:

“While the statute does not provide the express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly acquired by the statute.

Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. [25] It has breached that condition and the loss to the United States exceeds the penalty of the bond.

On the whole I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond, and judgment will go in its favor for the amount of such penalty.

[Endorsed]: Filed March 13, 1917. Walter B. Maling, Clerk. [26]

*In the Southern Division of the United States
District Court, for the Northern District of
California, Second Division.*

Before Hon. FRANK H. RUDKIN, Presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILLINOIS SURETY COMPANY, a Corporation,
Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED: That on the 6th day of February, A. D. 1917, the above-entitled cause came on for trial, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties, Ed. J. Jared, Esq., Assistant United States Attorney appearing on behalf of the plaintiff, and T. C. West and F. de Journal, Esqrs., appearing on behalf of the defendant.

THEREUPON the following proceedings were had:

Testimony of C. L. Marple, for Plaintiff.

C. L. MARPLE, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I am now and have been for close to 28 years a clerk in the office of the collector of customs at the Port of San Francisco, California. I was such during the year 1911. Now handed to me is an Entry

(Testimony of C. L. Marple.)

for immediate transportation in bond of passenger's baggage without appraisement, with the number 511, which is a record of the collector's office. [27]

The plaintiff offered the said document and the same was admitted in evidence and marked "Plff. Exhibit 1" and the said original exhibit is hereto annexed and made part of this bill of exceptions.

WITNESS.—(Continuing.) This is an entry covering 183 pieces of baggage that arrived with the passenger on the steamer "Caroline" from Havre, France, and this baggage was transported under bond to San Francisco, to the care of the collector, for entry at San Francisco, on a bond which is of course provided by the regulations. It is consigned to the collector of customs, San Francisco. Apparently, Pierre Grazi was the consignee of these goods. This entry is dated November 4th, 1911, the date of the arrival of the vessel.

The COURT.—Q. That was an entry made in your office here in San Francisco?

A. There is an entry based upon this. I understand that the 4th of November was the date the goods arrived in New York and the entry was made at the same time. It is here stipulated that the 183 packages of merchandise covered by Plaintiff's Exhibit No. 1 are the same as those set out in the complaint. The affidavit attached hereto, on the entry, this white sheet, was presented to the acting deputy collector of customs, at the customs-house, duly signed by the importer, and received a number, the entry number; it is duly sworn to before the Acting

(Testimony of C. L. Marple.)

Deputy Collector, T. J. Barry, by Pierre Grazi, the importer. The penal bond is filled out and signed by Grazi as principal, and the Illinois Surety Company as surety. This is the penal bond for redelivery within ten days after return of the appraisement. This entry is the official entry of the merchandise in San Francisco, in the custom-house and is the entry upon which the amount of duty has been determined by the liquidating [28] clerk. That liquidation is based on the United States Appraiser's advisory classification of the different items, and I find the clerk has applied the proper rate of duty as provided for in 1909, and it was brought into this slip of paper attached. The duty here amounts to \$9,726.16.

Objected to by defendant as not being the official liquidation and not the original liquidation and not the best evidence, which objection the Court overruled, to which the defendant excepted and which is herein designated as error No. I.

The COURT.—Q. Is that the first appraisement or the last?

A. The only appraisement.

The COURT.—Q. I thought you said the duty under the first appraisement was \$5,000.

Mr. JARED.—Yes; that was estimated by the importer and the duty we showed upon it amounted to this. He made what was called a consumption entry.

WITNESS.—(Continuing.) The amount of duty

(Testimony of C. L. Marple.)

upon the goods, determined upon the liquidation was \$9,726.16.

There it was stipulated between plaintiff and defendant that of the goods imported and entered a certain amount was redelivered to the collector of customs and exported amounting in value to the sum of \$5,852 upon which the duty was \$3,617.34.

According to the record, I know that Mr. Grazi got possession of these goods—

Defendant's counsel interrupting witness objected thereto as being immaterial, irrelevant and incompetent and assuming something not in evidence, there being no evidence showing that Grazi ever got these goods; which objection was overruled and defendant excepted.

The COURT.—He is asking if he knows. The witness was going to speak from the record. That is apparently the only information [29] he has.

Which above ruling defendant designated as error No. 3.

WITNESS.—(Continuing and answering question.) Grazi apparently got the goods at the date of entry. I have no personal knowledge.

Cross-examination.

The official return of the appraiser is noted on the invoice; I believe it is dated January 8th, 1912. The importation was November 4th, 1911. These figures are based upon the return made on the invoice, and of course we were in possession of the entry some time in the liquidation department, but the liquida-

(Testimony of C. L. Marple.)

tion was officially made as per date stamped on the entry, which is September 4th; this is the official date of liquidation, September 4th, 1913.

The COURT.—Q. That was almost two years after the importation?

A. Yes. I mean by that, that while the duties were not computed and carried out in detail until September 4th, 1913, the goods were actually appraised sometime between the 11th of November, 1911, and January 8th, 1912. From the records they were during that time at the Valencia Theatre. The records available to me do not show that any person connected with the customs department was in charge of the goods. It is not the custom that someone will remain in charge when the special privilege was given to make the examination at the Valencia Theatre and said privilege was given by William B. Hamilton, special deputy. I understand that it is the practice to exact from the importer fees where the examination is made at other places than the Appraiser's Store. I should judge that it then follows, of course, that there would be some one of the customs officials out there in charge of these matters until the appraisement was complete. I know the mode followed by the customs officials. I have no reason to believe that any different custom was followed in this case than would be in any outside examination.

[30]

I did not say that I knew whether or not any one was in charge of these goods. This was outside of my particular duty. Mr. Maguire could tell you

(Testimony of C. L. Marple.)

who knew that, in the customs department.

The COURT.—Q. Does the Government surrender possession of these goods when the bond is taken?

Argument by respective counsel.

Mr. JARED (to Witness).—Are you familiar with the ten-day bond that was given in this case? Just state the object of that bond if you know.

Objected to by defendant because the bond will speak for itself and can be construed in court as well as by customs officials, which objection was overruled by the Court, to which defendant excepted, which is ruling designated as error No. 4.

WITNESS.—(Continuing.) This penal bond was given for the return to the government's custody of any of the goods or effects in the possession of the importer up to and including ten days from the official return of the appraiser. The official return of the appraiser was made sometime in January, 1912; this bond lives for ten days after the date of that return; it then expires. The return dated September 4th, 1913, is the liquidation based on the appraiser's return of January 8, 1912. This bond does not last until ten days after the liquidation of the articles, but lasts until ten days after the return of the appraiser, that is noted on the invoice. This is the official invoice. There is the date of the official return, January 8th, 1912. This \$10,000 bond was good for ten days after that.

Testimony of James W. Maguire, for Plaintiff.

JAMES W. MAGUIRE, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

I am from the appraiser's office and have been connected with it for 25 years. My duty there is to examine and appraise imported merchandise. This *pro forma* invoice and supplement to it dated on the back November 11th, 1911, No. 15,888, [31] was filed in our office. This invoice consists of a tabulated statement of the contents of the packages that were examined at the Valencia Street Theatre after November 11th, consisting of 183 packages of the Grazi Opera Company. The original document is the first sheet of this paper. It consists of *pro forma* invoice lumping 183 packages, without specifying the contents of any of the packages, at a valuation of \$5,000. That was the value placed by the importer. I made a statement to the people of the opera company that I would refuse to accept this paper and that we would have to have a detailed statement of each particular package. Then they furnished me a memorandum in French. The different people did that—Mr. Grazi and the different members of his troupe. Each one furnished me an entirely different list of their own particular possessions. I did not raise the unit of value of any of those articles that were submitted to me, but the gross amount of the merchandise covered was in excess of the amount that the importer declared on entry. I did not fix the value, each statement had a value attached to it.

(Testimony of James W. Maguire.)

Those values aggregated the amount that I finally returned. It was something like \$15,000 and some odd. I went out to the opera house on Saturday afternoon and was asked to come again on Sunday. These packages came by freight from New York, and by some mishap or bungling on the other end of the line, all the personal effects of the entire troupe, of over 100 people, were in this baggage-car; so they had nothing at all, no change of wearing apparel, no change of underclothing; on Sunday we went out there and made an examination, and I allowed these people to take their own personal belongings; in the trunks they had the individual costumes that belonged to the individual actors; they took those and took them to the hotel where they lived. I met Mr. de Journal while this transaction was going on. It is my impression that Mr. de Journal did all [32] the typewriting on these papers in this supplemental list, or had it done in his office, I gave him the pencil memorandum and he made up this list for me. I do not think there is any article in that invoice that is not subject to duty. Everything here is simply and purely theatrical effects. I do not remember the date that I was up at the theatre a time or two. It was immediately after the arrival of the goods and before they were opened. I do not know what time those goods were delivered over to the theatrical company nor do I know the date. As I said, the different stars had baggage in their own apartments in different hotels where they were living, of their own particular effects; that is the theatrical effects that

(Testimony of James W. Maguire.)

belonged to them. The stock for the chorus was in storage in the room specially built on the stage of the Valencia Theatre. I do not know where the goods were taken to after they were taken out of the theatre.

Cross-examination.

By some mistake some of the private wearing apparel of the people of the troupe was in the same car. The invoice shows the number of packages that there were in that car. This first paper referred to as being the *pro forma* invoice of Mr. Grazi, states all the packages; 183 packages that were in that car; it does not give the detail of the contents of the packages. In some of the trunks there were personal effects of the individuals.

Q. I am talking about some of these packages which contained wearing apparel only and no theatrical goods. That was in the 183 packages, was it not? A. That is my impression; yes.

Q. As a matter of fact all that they did with these grips and packages and hampers that were not theatrical goods, was that upon being opened they were turned over to them because they were not dutiable. Is not that the fact? [33]

A. Everything that belonged to the personal members of the troupe were opened that day, and in some of the packages were also theatrical effects that belonged to the individuals; the stars had their own costumes and these costumes were taken to their hotels, and the only portion of the theatrical effects that remained in the theatre were the effects that

(Testimony of James W. Maguire.)

they had in the little room, and that belonged to the chorus—chorus costumes.

The COURT.—Q. That would not amount to much?

A. I don't really remember how much it amounted to; of course the ballet did not amount to much. I do not claim that these 183 packages were all theatrical costumes. I do not know; I do not remember, whether or not some of them had no dutiable costumes or dutiable theatrical goods in them at all. I could not remember of the three valises. I would not say at the present time whether those bundles contained theatrical goods or not. I know that some of these cases contained wearing apparel, private wearing apparel of the people which I turned over to them, also the whole contents of the packages. I allowed these people to take this out of their trunks, away from the theatre on that day. I am pretty certain. I know this much, that the inspectors that were there said: "Now they can take that package," and I said: "They can take that package." They probably would be the men to tell you in detail what effects they did take.

The COURT.—Q. Have you any personal recollection of it, Mr. Maguire?

A. My impression is that they took them. I refer to the theatrical dutiable goods. Those of the individual stars, they took them away. That is my impression now. I do not refer now to the delivery to the people, on the 8th of January of the other goods. I mean this was on Sunday, that Sunday I went

(Testimony of James W. Maguire.)

there; I forget the date; it was in November, [34] because these people were in such stress for a change of clothing; they probably did not take them until Monday, but on Sunday I was there.

The COURT.—Q. It was after arrival here?

A. Yes, they were on the stage.

It is my statement that their theatrical goods were delivered to them. When I say that you did the typewriting of this invoice (to Mr. de Journal) I mean that it was done by your office. I do remember that I requested somebody to attend to that and that you took a typewriter to do it. It had to be translated from French, from the original memorandum I had; you translated it and put it in that form. The first pages of that invoice represent the stock or in other words the costumes for the chorus that was kept on the stage of the theatre. I do not remember requesting that a special room be built with a lock and key on it and that all these things be put in there, but there was a room of that description there. I was not responsible for it at all. I remember that room; it was a room that was covered with canvas, a big lock on the door; it was not secure from thieves; they could go through the canvas and abstract anything in the room, if they wished. I do not remember that a man was kept there night and day, from the custom-house—two men. That had nothing to do with my department. My department was the appraisement of these goods. I do not remember the date that we were through with the appraisal; we had great difficulty in getting these different lists from the differ-

(Testimony of James W. Maguire.)

ent people. My final return of invoice will show the date.

The COURT.—Q. That is the 8th of January?

WITNESS.—(Continuing.) It would not show the return of the individual appraisal of the artists' goods; it is all together; that is the final return of the invoice. I did not say that after I appraised the artists' goods they took them to their hotel. [35] I said this; that when the trunks were opened on the stage, on account of the people needing their clothing, that we let them take their trunks, and in those trunks were some of these costumes. I just said that in those trunks they took to the hotel also were personal effects and stage costumes. It was either Sunday or Monday; we examined them on Sunday. They were not appraised then but we glanced over them. I had them fixed in my mind, in a way, what they were. I do not go to the respective hotels, to finish my appraisement of the goods. I saw these goods after that Sunday. I saw them at different times on the stage when the actors were wearing them; on the back of the people wearing them; that is a very good way to see them. The only appraisal that was done about these goods was prior to their being delivered to them on that Sunday and when I glanced over them when they were wearing them, and also by my assistants; some assistants were helping me, as you will remember. That is the only appraisal that was done about these artists' goods. As to the stock goods they remained there at the theatre and we went through them very shortly; I

(Testimony of James W. Maguire.)

think we looked at them very soon after they were packed and placed in this room. I did not find out on the 8th of January that there was \$15,888. I did not figure up the invoice at all. The liquidating department figured that. Mr. Marple here is the gentleman who knows about that.

The COURT.—Q. A mere matter of computation from your figures, was it?

A. All we did, Judge, was to certify to the quantity and unit of value; we did not compute the total amount.

The COURT.—Q. I say the total amount is a mere matter of computation? A. That is all.

WITNESS. — (Continuing.) (To Counsel.) I knew by the *pro forma* invoice that these goods had been valued at \$5,000.

Q. You knew equally well they were worth \$15,888. [36]

A. I did not figure it up.

Q. You never knew that at all?

Mr. JARED.—This is simply arguing with the witness.

Mr. de JOURNAL.—I want to show to the Court that the department knew before the delivery of the goods they were worth \$15,888.

The COURT.—The witness told you he never computed the amount at all.

Mr. de JOURNAL.—I want to know when the department acquired knowledge of the fact that these goods, valued at \$5,000 by the importer, were really worth \$15,888, and he knew it.

(Testimony of James W. Maguire.)

WITNESS.—(Continuing.) They knew after I returned the invoice. The 8th of January. Until the 8th of January the collector's office did not know.

Re-examination by Mr. JARED.

The red writing on that supplemental invoice is the classification of the article in the hands of the United States, and that was all done in my writing. The tariff law requires it. I said a few minutes ago that Mr. de Journal had something to do with furnishing that supplementary list. That supplementary list that was furnished indicate the value of these articles. I did not raise the value of these individual articles, the units at all.

Mr. JARED.—Q. Then your appraisalment was done, as you said a little while ago, by looking at the garments and taking, also, the supplementary list of values furnished by Mr. Grazi and Mr. de Journal; is that true? A. Yes.

Mr. de JOURNAL.—He did not say I furnished anything. He said my office furnished some type-writing.

Mr. JARED.—Q. State whether or not Mr. de Journal was interested, and if he was around, what part he took in the transaction.

Mr. WEST.—We object to that as immaterial, irrelevant and [37] incompetent; there is no evidence here to show that Mr. de Journal at any time to that time or long after represented the Illinois Surety Company.

Mr. JARED.—Mr. de Journal would not dispute

(Testimony of James W. Maguire.)

that, I suppose, that he represented not only Grazi but the Illinois Surety Co.

Mr. de JOURNAL.—I dispute that I represented anybody in this matter; I represented Mr. Grazi, to do some interpreting for him, and to advise him in a legal way, but I had nothing to do with this. As to that evidence, I will ask that it be subjected to being stricken out, if it is not connected up.

WITNESS.—(Continuing.) Mr. de Journal was a great help to me out there. I showed him these French papers and memoranda, and he took them and made a transcript; some of them he handed to me in person, and some he sent to me. I don't remember whether he did tell me exactly who he was representing, but I understood Mr. Grazi. Upon that supplementary invoice furnished me I made the appraisement, as well as the examination of the goods. Counsel for defendant there moves that the evidence attempted to F. de Journal assistance with the Illinois Surety Company be stricken out upon the grounds that it was not so connected, that the defendant was the Illinois Surety Company only that witness testified to said de Journal was attorney for Grazi and did not testify that he was made attorney for the Illinois Surety Co.

The COURT.—The testimony will stand until final argument.

To which defendant excepted; which ruling is designated as error No. 5.

Mr. JARED.—I want to introduce the supplemental invoice.

Admitted and marked Plffs. Exhibit 3.

Testimony of C. L. Marple, for Plaintiff (Recalled).

C. L. MARPLE, a witness for the plaintiff being recalled by said plaintiff, testified in substance as follows:

The liquidation was made upon the invoice as presented to the collector by the appraiser, with all of these attached sheets. The exhibit that you hold, Plffs. Exhibit 3.

Testimony of Robert Todd, for Plaintiff.

ROBERT TODD, a witness called and sworn on behalf of the plaintiff, [38] testified in substance as follows:

I am from the adjuster's office—the same office as Mr. Marple—adjuster of duties. I have been in that position 8 years. I am a clerk. I recall that our office gave a notice of the liquidation. I have the record of the liquidation and can give the date. The book that I am reading from is a record of liquidations that are entered here, posted daily, on a bulletin-board.

The COURT.—Q. Notice to the importer?

A. Yes. Notice to the importer, notice that it was being liquidated during the day.

The COURT.—Q. What is the date of the notice?

A. The date of this notice is September 4th, 1913.

Mr. JARED.—Q. What was the notice?

Mr. WEST (to Witness).—Is the notice written?

A. The notice was written.

Mr. WEST.—The notice will speak for itself.

WITNESS.—(Continuing.) This is the official

(Testimony of Robert Todd.)

record of liquidations which are recorded here as the liquidations take place from day to day. From this book a copy was made by me of the exact liquidations as they took place. This copy was posted on the bulletin-board on the general floor of the customs-house; in other words, notice to the importer.

Mr. JARED.—Q. What does that notice consist of?

Mr. WEST (to Witness.)—Q. Have you got that notice? A. No.

Mr. WEST.—We object to that as immaterial, irrelevant and incompetent. The notice should be produced.

WITNESS. — (Continuing.) The notice was placed on the bulletin-board on the day of the liquidation, usually in the afternoon before the close of business, and remained there for a period of, I should say, two weeks, after that time they were usually taken or taken down and used; we have been accustomed to use them for [39] office paper.

The COURT.—Q. They are not preserved?

A. No, they are not preserved. I know of my own personal knowledge, from leaving my record there, that notice was put up.

Mr. JARED.—Q. What did it consist of?

Mr. WEST.—At this time we interpose the objection as irrelevant, immaterial and incompetent, because this is not the notice that is contemplated by law; the law says it shall be mailed to the last known address of the importer. There is no provision in

(Testimony of Robert Todd.)

the law for posting of this notice that we have been able to find at all.

Which said objection of the defendant was overruled by the Court, to which the defendant excepted, which ruling is designated as error No. 6.

Cross-examination.

WITNESS.—This one here is the entry. This liquidation duty we have here \$9,726.16; those figures were taken from the original entry. Yes, taken from the original entry. That is the liquidation that is made out here; yes, taken from the entry. I mean by the original entry the original entry such as you have there. The original entry is the document that is shown here—the figures referred to here—when this estimate was put down at \$3,000. I took the figures of this \$9,726.16 from the entry.

The COURT.—Q. From the report for the appraisers?

A. Of course it eventually came from the appraisers, but I took that—that is figured in the collector's office. After the appraisal. It is taken from the record of the appraisal.

The information for this figure was derived from these papers which show this duty to be \$9,726.16 from the entry. The entry that I got it from was made on November 11th, 1911. [40] This entry of November 11th, 1911, showed the liquidated amount of the duty amounted to \$9,726.16.

The COURT.—Q. The liquidation was made until after that date, though, was it? At least it was not reported to your office?

(Testimony of Robert Todd.)

A. The liquidation, what we would call the final liquidation, was on September 4, 1913; that is the record of official liquidation.

Mr. WEST.—Q. Was there anything in the customs office as of date November 11th, 1911, to indicate in any manner, then, that the duty of these goods was \$9,700 and odd?

A. That is a question that I could not answer; that would be up to other officials.

Q. Is it not a fact that the entry of November 11, 1911, according to these figures here, showed the duty to be \$3,000?

A. It showed the estimated amount of duty.

Q. That entry of \$3,000 is a figure that is derived from the papers of November 11, 1911?

A. That is from the date of entry, but the other comes from the liquidation of the invoice.

Mr. JARED.—I want to ask you: I hand you here a *pro forma* invoice and liquidation attached thereto: Did you have that in your possession at the time, before you made this entry?

A. Yes, that is where I made my entry based upon that liquidation, from this entry.

The COURT.—Q. Why was the entry made so long afterwards?

A. That would be up to somebody else to answer that.

Mr. JARED.—I want to read this into the record. In the Column "Entry No," 158 in the column "Importer" Pierre Grazi. In the column "Name of Vessel" rail. In the column "date of Entry"

(Testimony of Robert Todd.)

November 11, 1911. In the column "Estimated duty" \$3,000. In the column "Liquidated duty" \$9,726.16. That is from the customs-house record, on page headed "Record of entries and estimated [41] duties" on one page, and then on the next page, right hand, "Liquidated September 4, 1913," and in the column "Date of payment" it is vacant.

Mr. de JOURNAL.—It should not be that much there, because we paid \$3,617, and it is not recorded there; by way of returned goods.

WITNESS.—(Continuing.) I said that on the 4th of September, 1913, following this entry, I posted a notice at the customs-house. That is all I did in connection with the notice. It was my duty to make these entries in this book.

I was the only person authorized to do it at the time, and the only person who at the time was authorized to post the notice. No one else in the office did anything of that kind. If any notice was given, the notice I gave was by posting.

Testimony of Thomas W. Scott, for Plaintiff.

THOMAS W. SCOTT, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

(Interrogated by Mr. BROWN.)

I am employed in the customs service in San Francisco. I have been employed here over 30 years. I have been the bond clerk for the last ten years.

Mr. JARED (to Counsel for Defendant).—Will you admit the execution of that bond and delivery

you admitted in your answer as to the execution of it?

Mr. WEST.—We will admit this is the signature of the Illinois Surety Company.

Mr. JARED.—We will go ahead and prove it then.

The COURT.—Is the execution of the bond denied?

Mr. JARED.—They deny in their amended answer that it was delivered, and we were just introducing this to show it.

Mr. WEST.—You are not offering the bond in evidence now?

Mr. JARED.—No.

The COURT.—I think the possession of the bond by the Government is *prima facie* evidence of delivery. [42]

Mr. WEST.—We will admit that they got that bond on the 11th of November, 1911.

Mr. BROWN.—Will you admit the delivery?

Mr. WEST.—We handed it over to the Government. I suppose that will be sufficient.

The COURT.—If the bond was handed over to the Government, that is delivery, all right.

Mr. de JOURNAL.—To make it plain, there is just this point: that there was at that time only the one bond for \$10,000 and this bond was to take effect after the other bond had lapsed, because the consideration of this bond was the delivery of the goods to Grazi; so, if we can prove that these goods were not delivered by the custom-house officials until January 8th, 1912, although they had the custody of

this bond, as they had also the custody of the goods, there could not be an actual delivery of the bond, so that there was no consideration for the bond to put it in force and effect.

Mr. JARED.—I assume that the defendant admits the delivery of this bond sued on.

Mr. WEST.—No. Looking at this bond now, this is not the bond sued on at all. There are things in this bond not in ours.

Mr. BROWN.—You have a copy of the bond?

Mr. WEST.—It is not this one at all.

The COURT.—If you admit that the bond was signed by you and turned over to the Government, that is all the Government is able to prove, anyhow.

Mr. WEST.—Yes; we will reserve the right to object to this bond if this is what they are going to base this case on—we reserve the objection to the admissibility of that document, because it is not the document referred to in the pleadings.

The COURT.—If you admit the one referred to in the pleadings, [43] I do not care what the books shows.

To which ruling of the Court the defendant excepted and which ruling is designated as error No. 7.

Mr. WEST.—We do not admit the efficacy of it. We admit it was delivered.

THE PLAINTIFF RESTS.

Mr. WEST.—May it please your Honor, just before the noon adjournment, so as to make the record clear, we admitted that the defendant executed a certain bond, but when the bond was produced here

I notice that it is not the bond that is referred to in the pleadings, and relying on paragraph 4 of our answer, I am going to ask your Honor to indulge me in withdrawing the admission of delivery. Of course, we admit there was a bond executed along the terms of the pleading here, but in paragraph 4, on page 3 of the amended answer, we allege as follows:

“In answer to paragraph 6 of the complaint, defendant admits that it executed as surety, the bond therein set forth but denies that said bond was delivered as alleged or at all, and avers that said bond is null and void and of no force and effect.”

So I would like to withdraw the admission that the bond was actually delivered, in so far as the word “delivered” has any legal significance.

The COURT.—I did not understand that you admitted it was legally delivered; you admitted it was passed over to the Government, however.

Mr. WEST.—That was my understanding, but for fear the Court did not understand that entirely, or was misled by that, we admit that the Government has it in its possession, but the delivery of the bond we do not admit.

Mr. BROWN.—The paper was physically delivered into the custody of the collector, was it not?

Mr. WEST.—Of course, the paper was physically delivered [44] to the Government.

Mr. JARED.—We had on the stand Mr. Scott, to prove by him and also to put in evidence the original

bond, and if that is denied, that the bond that we have set in our pleading—

The COURT.—He admits that was handed over.

Mr. WEST.—Do not be deceived on this point, Mr. Jared; we do not admit that the bond that you have produced to-day is the bond referred to in this pleading at all, because there are some changes in that bond since we signed it.

The COURT.—You admit the execution of the bond which is attached to the complaint; whether that is the same one that is offered in evidence or not, I dont know.

Mr. WEST.—It might be compared with the other, because it might make a difference in the proof, on account of the change made since signature.

The COURT.—You admit specifically the execution of the particular bond which is attached to the complaint.

Mr. WEST.—Yes. We will call on the Government at the proper time to produce this bond that we executed.

The COURT.—Under the pleadings, of course that is not in issue at all. You admit you executed a bond?

Mr. WEST.—We admit we executed a bond in this form, but if it is shown for the first time that this bond was changed since we executed it, then, of course, that would have the legal effect of releasing the surety, and we might have to ask leave to amend the answer.

The COURT.—That is not the defense you have interposed at all; on the contrary, you have expressly admitted the execution of the particular bond attached to the complaint.

Mr. WEST.—In case the evidence shows that this bond that they have has been changed, because it has been changed without our knowledge or consent, then of course we are going to ask leave to amend our answer to conform with the [45] proof.

The COURT.—You would have to ask leave first, because the proof would not be admissible until the pleadings were amended to meet that issue.

Mr. WEST.—At this time I ask leave to file an amended answer setting up that there has been a change in the bond referred to in the complaint, and the surety is released. I can file a formal answer.

Mr. JARED.—Will you state how it has been changed?

Mr. WEST.—I see by this bond in the pleadings it is stated that we gave this bond on the 11th of November to return these goods, a redelivery bond to return the goods in six months; it alleges that we had an extension of six months, bringing it up to the 11th of November, 1912. On the bond I saw this morning there is a further extension of six months. We do not know anything about that. We think they changed the conditions of the bond. If the Government changed it after signature, I think it releases the security. It might hold the principal but not the surety.

The COURT.—Do you mean that they changed the bond itself, or that they committed some act which released the surety?

Mr. WEST.—The exact facts are these, that on this bond that they produce this morning, it is not mentioned in the pleadings at all that there has been an extension granted for six months from and after the 11th of November, 1912, which was the expiration of the extension which we admitted in our pleading.

The COURT.—Is that in the bond, itself?

Mr. WEST.—In the bond itself. I just noticed that a moment before the adjournment. Defendant asks leave now to file a formal answer setting up that the bond has been changed since execution by the surety company. It might still [46] hold the principal but not the surety. We are only representing the surety company in this case.

The COURT.—Any objection to that?

Mr. JARED.—No objection.

Mr. WEST.—We ask leave to file an amendment; I now file a formal amendment.

The COURT.—Very well.

Mr. WEST.—With that clear in the mind of the Court I now at this time move for a nonsuit, and for judgment for the defendant on the following grounds: First, that this bond is not the bond contemplated by law. There is no authority for the Government to accept such a bond in view of the evidence that was produced at this trial in this, that the bond for redelivery could only be given by a person who actually accompanied the goods from the for-

eign country, on the identical ship that it comes in on. I am not quoting the authorities now; we will take them up later. That the evidence in this case shows that Grazi was here in San Francisco prior to the 11th of November, and that these goods came from France in the custody of one, Magagno.

The COURT.—That does not appear in the testimony up to date, does it?

Mr. WEST.—The affidavits produced show that. The documents show further that the owner of these goods was one Barisseau; that they came here accompanied by Magagno from Paris on a certain ship arriving in New York on the 4th of November, 1911, and that Grazi was here prior to that and did not accompany them upon that ship. The second ground is that the evidence shows that there was no delivery of these goods under the \$6,000 bond.

The COURT.—As I said to you this morning, I would not grant [47] the motion for a nonsuit unless it was entirely clear that the Government had no case at all.

Mr. WEST.—I will state these grounds and will argue them later.

The COURT.—If you intend to rely on your motion, I will consider it, but if you intend to go ahead and offer your proof you will waive your motion for a nonsuit.

Mr. WEST.—I will state for the sake of the record the grounds.

The COURT.—If you go ahead and offer your testimony you waive your motion for a nonsuit.

Mr. WEST.—I quite realize that, but I will state them briefly. The second ground is there was no delivery under the \$6,000 bond; if there was any delivery it was under the \$10,000 bond which the evidence shows was given on the same date, and, therefore, there was no consideration for this \$6,000 bond; third, that the evidence shows in this case that between the 11th of November and after the date the bond in question is given, and prior to the 8th day of January, 1912, the Government discovered that these goods were grossly underestimated, to wit, to the extent of about 300%, and that it became their duty to then confiscate these goods. Fourth, that the Government did not exercise the privilege at the time and confiscate the goods as shown by the evidence. Fifth, that the goods were never delivered to Grazi under any circumstances, or to the owners, as shown by the testimony; that the owners had made out lists showing what they owned, and upon these lists and the estimate they were delivered to the owners on or about January 8th, 1912. Sixth, that the Government had notice that Grazi did not own these goods at the time the bond was given on the 11th of November by reason of documents that accompanied them showing that they were imported by Magagno, and belonged [48] to Barisseau. They again had full notice of the appraisement that was made after the 11th of November and prior to the 8th of January, 1912. Those are the grounds of the motion for a nonsuit. Of course, there is a question of whether we waive them by introducing evi-

(Testimony of Charles T. Hughes.)

dence. I would like to make that motion at this time.

The COURT.—There is no question about the waiver of the motion. The motion will be denied. That is, I deny the motion under the assumption that you are going ahead with your proof. Of course, if you are going to rest on it I will hear from you.

Mr. WEST.—We will go on with our proof.

To which ruling of the Court the defendant excepted and said ruling is designated as error No. 9.

Testimony of Charles T. Hughes, for Defendant.

CHARLES T. HUGHES, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I was general agent of the Illinois Surety Company in the month of November, 1911. I remember giving, on the 11th of November, 1911, a bond on behalf of Pierre Grazi, in which the Illinois Surety Company was surety, for the redelivery of certain theatrical goods. That bond is for \$6,000. Simultaneously with the giving of this bond two other bonds were given at the same time. One was a bond in the sum of \$6,000 to produce the invoice, and the other was in the same form, a penal bond. The amount of the bond known as the penal bond was \$10,000. I am familiar with bonding in these matters. I have had about twenty years' experience. I have not in mind the conditions of the bond for

(Testimony of Charles T. Hughes.)

\$10,000. It is ordinarily known as a penal bond; my understanding of it, however, was that it was given to cover the period of appraisement, temporary period of appraisement [49] being made outside of the bounds of the warehouse or in the customs-house. (It is there admitted that the bond speaks for itself.) At the time that I gave that \$10,000 bond on the same day I gave two \$6,000 bonds, one for redelivery and one to produce the invoice. This redelivery bond shows in my own writing the signature of the Illinois Surety Company.

The COURT.—That is the original?

Mr. WEST.—Yes, I think it is.

WITNESS.—(Continuing.) At the time I executed this bond I don't think the notation was on it: "Ex. 6 months to November 11th, 1912." I think that refers to an extension thereafter granted. That was an extension that was granted at the expiration of the first six months. That is the second extension granted.

Q. In pencil marks here there are two notations, extended six months, to November 11, 1912. Now, I ask you as to this writing in ink. "Extended"—I don't know what that first word is—"Extended six months to June 11th, 1913"—was that on the bond at the time you executed it?

A. I could not positively say whether it was or was not. I have not any recollection of it.

Q. Mr. Hughes, there has been some evidence given this morning that this stuff was afterwards

(Testimony of Charles T. Hughes.)

appraised, was appraised prior to the 8th of January, 1912, liquidated apparently on the 4th of September, 1913; did you ever receive any notice that the stuff was appraised on September 4th, 1913, and the duties fixed at \$9,000 and some odd?

A. No, I have not any knowledge of that. I think the first suggestion of liquidation or of the penalty was at the time of the demand from the collector of customs. I don't remember just when that was.

The COURT.—That was when the suit was commenced, was it? [50]

A. No, I think it was sometime previous to that. I think his letter was referred by me to the office of Gavin McNab, general counsel for the company, and thereafter there was some conference between the district attorney's office and McNab's office. I think it is quite sometime sooner than January 9th, 1915. It was in advance of three or four months before April, 1915, because there was a conference between the general counsel for the company and the district attorney. I think that the first intimation that I had that the goods had been appraised at \$9,000 and that the duty on them had been fixed at (\$9,000) was the demand by the Government for the payment.

The COURT.—That was long after the date fixed by counsel?

A. Yes. If I had received any notice I would have it in my files. I could not find any.

Q. Did you or did you not receive any notice on or

(Testimony of Charles T. Hughes.)

before September 4, 1913, that the duty on these goods was fixed at \$9,000?

The COURT.—He has answered that question.

Mr. WEST.—As long as that is clear in your Honor's mind, very well.

WITNESS.—(Continuing.) At the time I gave bond for \$6,000 redelivery bond or representative of the surety company, as to the value of this goods, it was stated on the bond—my understanding of the value of the property was that it was \$5,000. If the Illinois Surety Company had known that these goods were of a greater value than \$5,000, it would not have given the bond. That was, under the circumstances, the utmost limit of a bond of that kind it would give. My understanding of what the figures \$3,000 and \$6,000 in the upper left-hand corner of this bond are, is that the \$3,000 is the duty upon the valuation of the goods, and the \$6,000 is double the duty, being the penalty of the bond.

The COURT.—That was estimated on the \$5,000?
[51]

Original bond offered in evidence admitted and marked as Defendant's Exhibit "A."

Cross-examination.

At the time that this bond was executed, I had an unlimited power of attorney for the company in the state and the power to execute this bond. I stated that there had been one extension of the bond of six months. The bond first gave six months to export these goods and there was another extension making

(Testimony of Charles T. Hughes.)

it twelve months. If the bond was made November 11, 1911, that one year would extend it up to November 11, 1912. I do not think that within that year I knew of the amount of the invoice that was made by the Government. I do not have any recollection now of having known it. I do not recall whether I did know or not. I made an affidavit in conjunction with a petition for cancellation. (Witness being shown the affidavit.) That is my signature. That is the affidavit that I made. The date is April 29th, 1912.

Mr. JARED.—I will ask you if you made this affidavit: "That this affiant is informed and believes that at the time of the entry of these goods, the stated and appraised value was and is, greatly in excess of the actual value of said goods, but Pierre Grazi and his attorney, after taking the matter into consideration, and owing to the fact that Mr. Grazi was then in good financial circumstances did not fully consider the said item of valuation in making the declaration of the said valuation."

A. Evidently.

Q. Then you knew at that time what the goods had been appraised at?

A. I probably did. I did take a part in having a lot of these goods collected and exported or returned to the Government. I think that it was either within the year of the life of this bond or during the second extension, within the life of the bond.

Q. I will ask you if you did not permit them to take certain [52] goods with them as you stated?

(Testimony of Charles T. Hughes.)

The COURT.—Q. During the life of the bond?

Mr. JARED.—Yes, certain goods. I will read here and see: “That I know, not only by reason of information, but also by my personal knowledge, that these opera singers were undergoing great hardships, and while I retained a few of their goods, I allowed them to get some of them, without which they would have been destitute, and owing to the fact that as they did not speak English they would have been a charge upon the community.” That is your statement?

A. Yes. I permitted them to take certain goods with them. Theatrical goods. That affidavit I made was upon application to cancel the bond or upon the application for extension. Undoubtedly it is upon the application to cancel the bond.

Re-examination.

I don't think that when I made that statement there I had any knowledge of the exact amount of the valuation of those goods. I was generally informed that the goods had been either undervalued by Grazi or overvalued by the appraisers. I do not remember who made the representation to me. I do not believe I ever talked to anybody connected with the customs-house, it was not somebody connected with the customs-house. It was somebody else other than the United States officials. As I explained before, the first positive knowledge as to liquidation, as it might be termed, was upon the demand of the collector of customs. The demand that a specific sum be paid. Before that time, I don't know from what source the

(Testimony of Charles T. Hughes.)

representation was made, but I did know that there was a valuation over and above the valuation set forth in the bond. I do not remember the name of the persons whom I allowed to take these goods, it was [53] members of the troupe other than Grazi. I think one of them was Mr. Di Lucca. There were three or four of these members of the troupe who were attempting to take away the property and leave us liable; I think Di Lucca was one of them, and through some means—I forget just what it was—we located some property, and subsequently I exacted, either from him or from the two others, a co-indemnity obligation to render the company free from liability, in the event we had to pay on that part of the obligation. I never had possession of the Grazi goods. Nor of the artists' goods. There were some goods that were shipped to me by Mr. de Journal from Los Angeles at the time the troupe was playing in Los Angeles. That is the way the possession of these goods came to me. Up to that time the artists had possession of these goods.

Q. But you never had any notice of the appraisalment of \$15,000 until the time you said was somewhere around January, 1915.

A. No. It states in that affidavit there. There is no doubt but what after the execution of the bond, after the appraisalment, there was some knowledge on my part that the appraisalment was in advance of the amount on which it was entered. That was long after the delivery of these goods to these people. Prior

(Testimony of Charles T. Hughes.)

to the delivery of the goods to these people I never knew of it.

Q. You never knew at any time, did you, that you were to be held for twice the amount of the duty, of the lawful duty, on \$5,000 worth of goods.

A. I did not have knowledge in that direction; that was a matter of law that would necessarily be referred to the general counsel for the company.

Q. When did you acquire that knowledge as regards the date of [54] affidavit; a long time before the affidavit was made, or immediately before it was made? I want to fix the date of your acquiring that knowledge.

A. I am not positive of that, Mr. de Journal. I am inclined to believe then. I knew that in one of the applications based upon an affidavit was made by yourself or by somebody else, there was a statement of excessive valuation over the original entered valuation.

By Mr. JARED.—Q. Mr. Hughes, you knew Mr. Grazi, did you not?

A. I met him, yes. It was my understanding that he was the manager of this theatrical troupe.

Testimony of Joseph W. Legget, for Defendant.

JOSEPH W. LEGGET, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I am custom-house broker. I remember in the month of February, 1912, receiving a letter from Mr. Grazi's attorney, requesting me to call upon the

(Testimony of Joseph W. Legget.)

customs-house department and proper officials in San Francisco with some instructions.

In pursuance to the request in the letter I did this: I inquired whether these goods which were covered by a redelivery bond, or a part of them, could at that time be surrendered into the custody of the customs.

Q. What did they say to that?

A. They said they could not.

Q. Did you request that they be seized and confiscated by the Government?

A. I don't recall that I made a formal request that they be seized. I inquired whether they could be seized or taken into custody, and I was told that they could not; that the redelivery bond having been given, that the only thing that could be done by Grazi or his representatives was to hold these goods and to [55] export them. That was about February, 1912.

Cross-examination.

I knew at that time that a six months' bond had been given for these goods. I knew that that six months' was given about November 11th, 1911. I understand as a customs-house broker, that a person giving a six months' bond is entitled to the custody of those goods for six months.

Testimony of Louis I. Imhaus, for Defendant.

LOUIS I. IMHAUS, a witness called and sworn on behalf of the defendant, testified in substance as follows:

I am a playwright and theatrical manager. I was

(Testimony of Louis I. Imhaus.)

the stage manager and interpreter for Mr. Grazi when he was here. I began on my duties in the beginning of November, 1911. On about the 1st of November, 1911, Mr. Grazi was here in San Francisco. He was in San Francisco up to the time when I left him at the time he went to Los Angeles; that was about the 4th of January, I believe, the following year, 1912. He was here continuously from the 1st of November until the last day. He was here also during the summer of 1911. He came here about the month of March and was here all summer. I entered upon my duties at the Valencia Theatre between the 1st and 4th, two weeks before the production. The production was on the 13th. I was there during all that time from 8 o'clock in the morning until 12 o'clock at night. He was there off and on all day long. I remember the theatrical goods and effects coming over to the Valencia Theatre. I think it was about the 10th or 11th of November, somewhere around there, a few days before the opening. I think it was on the 11th. The goods came by the Union Express Company; they were delivered there and the actors came up one after the other. I don't know whether any customs officers came with these goods. I know they were there at the time when [56] we opened the trunks. The trunks were all placed on the stage; that is the first trunks that came with the effects of the actors, and then day by day there came the balance of them, which are naturally the costumes of the chorus. When these goods were landed in the Valencia

(Testimony of Louis I. Imhaus.)

Theatre I placed them on the stage in rotation, at different places, to be opened by the custom-house officials. The actors opened them with their own keys. Each trunk as they were asked, and then they were given permission to take out certain things, which they did. The custom-house officials were there taking count, because I was the interpreter, they all spoke French, and of course I had to get it from them in the French language and translate it for the custom-house officers in English. I think the custom-house officers had the custody of these goods while they were in the Valencia Theatre; they were the only ones I had anything to do with at the time. Well, the people all asked for their wardrobes, that is, their underclothing; they said they had left them in their trunks in Paris, and they were 22 days on the road, and they had not been able to exchange their underclothing, and they were clamoring for them. They said there was some trouble in New York, they could not get them and they wanted them, so I don't know which one it was, but some of the officers, I think Mr. Maguire was there at the time, allowed them to take their underclothing out of their trunks, but the costumes were kept there. They were placed in the trunk. They were placed right on the stage. They were not moved away at the time. Afterwards there was a room built for the purpose of storing any of these goods. That was done I think on Monday. I think the next day; that is when the balance of the costumes came. I think it would be Monday the 13th; each one of the actors

(Testimony of Louis I. Imhaus.)

had a list at the back of their [57] trunk of what they had in the trunk.

Q. Were these goods within the control of the actors during that time, or of anybody else up to the date that they were removed?

A. No one was allowed to touch anything until the contents of the trunk had been given first; they asked me to get what is in it. The customs officers asked me, they asked, "What is this?—it is such and such; now they asked to ask what it is made out of—wool, silk and so on, and I asked that question, then they wanted to know the weight of this and the valuation, what they considered it was worth; as the customs-house officers placed these figures all down, took an account of what was in there then the trunk was given into the possession of the actors, I believe, we worked all day Sunday and all Sunday night and then Monday; in fact we worked right along when the other came, when the chorus came, we had to go through the same formula with every piece of stuff that was there. I mean the following Monday; the 11th, 12th, 13th and 14th, the whole week I was there. The customs officers eventually delivered these goods to the actors and it was placed in their personal rooms; some of them went and got an express wagon to take them to their hotel. That was during the whole week until the performance commenced and and even after the performance, after the 13th—during that week. Now as to the rest of the costumes, a room was built at the back of the stage, back on the alleyway, on the left of the stage, a room was

(Testimony of Louis I. Imhaus.)

built there, a door and a padlock put on it, and as the costumes were entered on the list by the custom-house officers they were carried in by the man who had charge of the costumes, and put on a shelf in different places so that they could get at them whenever the play was produced; they would know where to get the costumes. [58] The customs officials remained in charge there for a very long time; they changed off and went away and came back, but mostly from the beginning, I believe for about three weeks or so, we left them in charge when we left the theatre; I was the last one to leave the theatre. I mean at night, I was the last one to leave the stage myself. And the custom-house officers remained there to take charge of what they had, and they were there during the day. They would say, "What time will you be here to-morrow morning, 8 o'clock or 9 o'clock"; they always made an appointment, what time to be there the next morning. I don't remember whether they stayed there all night; I was not there; I left them there. I left them there every night. That was for probably three weeks, I believe, and after that they were there nearly every day; one or the other came and said: "How are things going on?" and walked on the stage and looked around and would go away and so on; several of them were there during that time, in fact through the whole engagement, until we left for Oakland.

Q. They were in custody there for three weeks?

A. I know they were.

Q. Were they in exclusive custody and control?

(Testimony of Louis I. Imhaus.)

The COURT.—Those are conclusions. He has testified to the facts.

WITNESS.—(Continuing.) I know you could not touch anything unless they passed on it; everything had to be entered before anybody was allowed to touch it. Even after it was entered nothing was allowed to be removed from the premises except what they gave personally to the actors; the balance that was inside of the room there, that was never touched, never put away at all until everything was entered. That room was locked day and night. [59]

Cross-examination.

I said that the custom-house officers had been there at the theatre about three weeks. It took us over two weeks to enter the goods, that is, as there were so many costumes. I think there were 120 people in the troupe. I think that they were busy all the time in taking the appraisement of the goods. They were there. I know I was there all the time from 8 o'clock in the morning putting down each article—each article had to be put down; after we had the 183 trunks, I believe, all those had to be unpacked and then placed on the board and an account taken of them and then put back. From the Valencia Theatre we went to play several engagements to the Cort Theatre and moved some of the costumes. The customs officers were not there with us, they did not go to the Cort, they were at the Valencia Theatre. Each actor brought down his costumes; then as we had a play they simply moved the costumes down there and brought them back. The custom officers

(Testimony of Louis I. Imhaus.)

had not left us, they were still at the Valencia Theatre. We only went to the Cort Theatre for one night. Then we went back again to the Valencia and we did not leave there until we went to Oakland on the 4th of January; we were at the Valencia Theatre up to that time. The customs officials did not go with us to Oakland.

Mr. JARED.—Q. So that the goods were turned over then to the manager of the theatrical show. Is that true?

WITNESS.—(Continuing.) I don't know anything about it. My engagement ended that night in Oakland. I did not go to Los Angeles with them.

Testimony of Gaston Garonne, for Defendant.

GASTON GARONNE, a witness called and sworn on behalf of the defendant. [60]

Mr. de JOURNAL.—We would like to have Mr. Imhaus act as interpreter.

The COURT.—What is the purpose of this testimony, to corroborate the last witness?

Mr. WEST.—We want to show that he came from Paris on the ship with these goods; we want to show they were not brought here with Mr. Grazi.

The COURT.—Do you claim that they were?

Mr. JARED.—No, we do not.

The COURT.—You admit Mr. Grazi did not accompany the goods at all?

Mr. JARED.—I have learned since he did not.

Mr. WEST.—Perhaps we will go further. We want to show by him also that he was a member of

(Testimony of Gaston Garonne.)

the operatic company and that he did not receive his portion of these goods until some time in January, 1912; that during all of this time he had to go to the customs officials if he wanted to get any of his effects.

The COURT.—In accordance with the testimony of the last witnesses?

Mr. WEST.—Yes.

Mr. JARED.—I have no objection to that. Let him go.

Mr. WEST.—Probably this will be admitted too, that Mr. Grazi was here in San Francisco during the whole of the month of October, 1911, and did not come with these goods from France.

The COURT.—Counsel has already admitted he did not come. [61]

HERE DEFENDANT RESTS.

Testimony of F. de Journal, for Plaintiff.

F. de JOURNAL, a witness called and sworn on behalf of the plaintiff, testified in substance as follows:

At the time that these goods were brought to San Francisco, Mr. Grazi retained me to be his attorney. I do not know that you could call it my being his attorney from July on up; there were no legal matters to attend to; he came visiting at my office a great deal, and the only assistance I tendered to him was to interpret for him when he took the Valencia Theatre. I remember filing a petition, making an application to the Treasury Department to cancel this bond. I do not recall exactly that I stated in

(Testimony of F. de Journal.)

that petition that I was the attorney for Mr. Grazi and also the Illinois Surety Company, but if I did so state it is an error. That petition is dated on the 29th of April, 1912, but this is not correct. I never was the attorney of the Illinois Surety Company; Mr. McNab was, always. I don't know whether or not I was then the attorney for Mr. Grazi. I will explain to you, if you will allow me. He came to me from [62] France with letters of introduction, for me to act as his attorney. I never got a retainer from him at all. I did represent him at the theatre; I did go with him there. I did all I could, looking at the goods and helping them out here, in different ways. I know that these goods were shipped to Mr. Grazi here as manager, that they are consigned to him; we all supposed at the time that he was the owner of these goods; it was only afterwards that we learned he was not. He was the manager of the troupe—he was the proprietor of the troupe, at the time that these goods were shipped into this port. At the time that I filed this petition and also made the affidavit, I did not know anything about what the invoice price of these goods was. I did not know that it was much larger than the *pro forma* invoice was. I wish to explain what I mean by not knowing it; I knew that some part of the goods were appraised at a value ridiculously high, but I did not know that the total of the goods would aggregate \$15,888. I did not know that. I do not think that my affidavit will show anything like that. I know that some of the goods were valued by the appraiser

(Testimony of F. de Journal.)

at a much greater value than the people themselves said they were worth, some of the goods, but I was not there during the valuation of these goods; the department had to do that themselves; it would have taken a great deal of time for me to do it. I had no business to do it. I was and am yet the indemnitor on this bond.

Cross-examination.

Mr. Grazi was not the proprietor of the stuff—he was the proprietor of the troupe as impressario—the proprietor of the time of the artists for the time of the engagement—six months. We afterwards learned that he did not own any of the [63] stuff except a box containing some sheet music. What led me to the belief that some of the goods had been estimated ridiculously high by the Government is the information imparted to me by the Costumer in charge “Grimot,” that certain cotton slips, used in an opera called “Lakme,” and which cost 40 cents, had been appraised some three and two dollars each. I took some steps to have the Government confiscate the stuff. The trouble arose in this manner: some of the actors wanted to take these goods with them, and Mr. Grazi asked me whether they could do so, and I said to him that all these goods were supposed to be in his custody and care, but they still insisted; the chances were, as they had not given any bond that they were going to leave the troupe, and these goods would not be turned to the Government. I wrote a letter to Mr. Maguire asking him what to do about it; that was I think on the 13th of January, 1912,

(Testimony of F. de Journal.)

that was the time the first trouble arose and I thought the Government might do something to take these goods. Mr. Grazi was powerless, he did not own the goods. I never had any answer to that. Because of the failure to act of Mr. Maguire or of anybody else at the custom-house I wrote to Mr. Leggett; the same thing having occurred in Los Angeles. I went to Los Angeles on account of that trouble, the same thing having occurred there and some of these people wanted to go and take their goods with them whereby the Government would lose. I wrote to Mr. Leggett to go to the department and request them to confiscate. Nothing came from that. Mr. Leggett said that the department would not do anything. A year after that, these goods were seized by the Southern Pacific Railroad in Kansas City, and were eventually sold for \$590, but prior to that time Mr. West and I went to Mr. Duncan McKinley, then Surveyor of the [64] port, and whom we knew well and explained all matters to him and that these goods were then available to the Government, and requested that they be confiscated. Nothing was done. I learned in June, 1913, through an information given out by Mr. Stratton, collector of customs, that Grazi was dead.

CHARLES T. HUGHES, a witness for the defendant, recalled on behalf of defendant, The Illinois Surety Company, was placed in the hands of a receiver by order of the Superior Court of Cook County, Illinois. James S. Hopkins was appointed receiver on April 19, 1916. After the appointment

of the receiver there was an assumption of the going risks, live risks; this risk was abrogated by the Insurance Commission of Illinois; none of the risks were reinsured.

Mr. WEST.—If your Honor please, at this time I desire to add a paragraph to the amended answer to the effect that on the date specified by Mr. Hughes the order was duly and regularly made by the Superior Court of Cook County, Illinois, in which the Illinois Surety Company was placed in the hands of a receiver.

The COURT.—The only right of a receiver would be to make an application to intervene in this matter if he wanted to. The suit was pending at the time of his appointment and it would not raise a jurisdictional question. I deny the application to amend.

To which ruling of the Court the defendant objected and excepted and designates as error No. 10.

The foregoing constitutes all of the testimony adduced upon the trial of said cause.

Thereupon counsel for the respective parties argued said cause to the Court and submitted the same for decision, and thereafter, to wit, on the 13th day of March, 1917, the Court rendered its [65] decision in favor of the plaintiff and against the defendant for the sum of \$6,000.00, which decision was and is in the words and figures following, to wit:

No. 15,878.

(Title of Court and Cause.)

MEMORANDUM ON MERITS.

RUDKIN, District Judge.

“This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi, conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the Collector of the Port of San Francisco, and enter the same for exportation from the United States within six months from the date of importation.”

To which holding of the Court the defendant objected and excepted upon the grounds that the complaint shows in paragraphs V, VIII and X thereof and the defendant was thereby induced to believe that the action was for duties for which duties the importer was liable, but for which the surety-defendant herein was and is not under the terms of its bond liable to plaintiff, which said holding of the Court is designated as error No. 11.

“It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel, that such properties arrived in the Port and Collection Dis-

trict of New York, in the State of New York on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the Port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of \$5,000."

To which finding of the Court the defendant objected and excepted upon the grounds that same is against the evidence in that the testimony shows that the said goods were imported in the United States, to wit, in the port of New York by one Jules Moyreud, and were shipped thence by him consigned to said Grazi in San Francisco, which said finding of the Court is [66] designated as error No. 12.

"For reasons not entirely clear from the record, two bonds, were executed to the Government at that time, by the importer, Grazi, and the defendant company. The first for \$10,000 under Section 2899 of the Revised Statutes, which provides that the Collector may, at the request of the owner, importer, consignee or agent, take bonds with approved security in double the estimated value of the merchandise imported, conditioned that it shall be delivered to the order of the Collector at any time within ten days after the package sent to the public stores has been appraised and reported to the Collector. The second for \$6,000, under Paragraph 656 of the Tariff Act of August 5, 1909 (Fed. Statutes, Annotated, Supp. 1909, page 794), which provides as follows:

“ ‘Professional books, implements, instruments and tools of trade, occupation, or employment, in the actual possession at the time of arrival, of persons emigrating to the United States; but this exception shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons or for sale, nor shall it be construed to include theatrical scenery, properties and apparel; but such articles brought by the proprietors or manager of theatrical exhibition arriving from abroad, for temporary use by them in such exhibitions, and not for any other person, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation; Provided, that the Secretary of the Treasury may, in his discretion, extend such period for a further term of six months in case application shall be made therefor.’

“After entry, the goods were appraised according to law and the calculation fixed at \$15,558. The duty thereon computed according to law was \$9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof, of the appraised value of

\$3,617.34 were delivered to the Collector and exported; but the balance of the goods, subject to a duty of \$6,108.66, have never been exported from the United States or delivered over for exportation.” [67]

To which holding and finding of the Court the defendant objected and excepted, as to the holding that the goods were appraised, and the duty computed according to law upon the grounds (among others) that no notice of the appraisement and liquidation was ever given by the plaintiff to the defendant or to the importer or to any other person or at all, and as to the finding that upon the execution of the latter bond the goods were surrendered to Grazi upon the grounds (among others) that the evidence adduced shows that only a small portion of the goods, if any at all, were surrendered to said Grazi, the balance thereof was delivered to persons other than Grazi, and without his or the defendant's consent, and that as to said deliveries they were made long after the execution of the bond, to wit, on or about the 4th of January, 1912, which said holding and finding is designated as error No. 13.

“Although there is little controversy over the material facts, numerous defenses were interposed at the trial to which brief reference will be made.”

“It is first contended that the existence of the other bond in the sum of \$10,000 given under section 2899 of the Revised Statutes, avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was

taken. That bond is only required where goods are delivered to the consignee pending inspection and appraisement. Here, there was no delivery of the goods to the consignee until delivery was made under the bond in suit, so that the former bond never became operative, never served any purpose, and cannot defeat the present action."

To which holding and finding of the Court the defendant objected and excepted upon the grounds (among others) that it appears from the evidence and testimony in the cause that the goods were imported by one Moyreud in New York, thence consigned by him to said Grazi in San Francisco, that there being no provision of law for the admission free of duty, [68] under a bond for redelivery of theatrical goods merely consigned to, but not brought by the importer, it became necessary to hold them pending appraisement under the \$10,000 bond for their production to the collector for examination out of the custom-house, that said \$10,000 is shown to have been made use of and return thereof made to the custom department that the \$6,000 bond was not made use of until the final appraisement, to wit, January 8th, 1912, if at all, and that on that date the plaintiff knew that the valuation made by Grazi was fraudulent, that the goods ought to have been confiscated, and that the use of the \$6,000 obtained by fraud and misrepresentation of Grazi as to the value of the goods would perpetrate to the detriment of the defendant the fraud attempted by said Grazi,

which said holding and finding is designated as error No. 14.

“Again, it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless, they were so admitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again, it is claimed that the Government should have forfeited the goods for under-valuation. But I apprehend the right of forfeiture was given for the protection of the Government, and not for the protection of the importer or his surety.”

To which holding of the Court the defendant objected and excepted upon the grounds among others that the plaintiff knew and the defendant did not know, at the time of the making of the bond, the contents of Exhibit 1 of the plaintiff, to wit, that the said goods were not entitled to entry free of duty under a redelivery bond because they were not brought by the importer, but were shipped and consigned to him by the apparent owners thereof, and that the said recital of the said bond induced the [69] plaintiff to believe that said bond could be safely given under the protection of the law as to the requirements of the statutes governing the parties in the matter of the importation of said goods, and of a bond for their redelivery; and as to the remedy of confiscation to be applied by the plaintiff in accordance with the statute, in case of fraudulent

entry, and in further relying upon that the plaintiff would commit no act of forbearance or nonapplication of the statute such as would tend to make or render the defendant liable for a greater sum than he understood knowingly to secure, to wit the lawful duties on \$5,000 worth of goods, which said holding of the Court is designated as error No. 15.

“It is suggested that the goods were not delivered to Grazi but to members of the troupe. The redelivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe, with his consent and acquiescence was equivalent to a delivery to him.”

To which holding and finding of the Court the defendant objected and excepted upon the grounds that it appears from paragraph VII of the first defense in the second amended answer of the defendant that the delivery referred to therein and also referred to in the finding of this Honorable Court now excepted to is the delivery of \$5,000 worth of goods and no more, purported to have been entered, valued and appraised before the bond now sued upon was executed, and believed by said defendant to have been so entered, so appraised and so valued, and upon the further grounds that the consideration of the bond now sued upon was the delivery of the goods therein specified to Pierre Grazi and to no other person, and that the delivery that appears by the testimony to have been made, [70] with the consent and acquiescence of Grazi to other persons, but without the consent of the defendant herein to

same, is not equivalent to the delivery to Grazi under the conditions of the bond governing therein, which said holding and finding is designated as error No. 16.

“It is claimed that the surety was released by an unauthorized extension of the time for exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. The only evidence of such extension is a notation on the face of the bond made some time after its execution, but by whom or when made, is not disclosed. The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter.”

To which holding and finding of the Court the defendant objected and excepted upon the grounds that the said defense is raised by the defendant's

third defense of his second amended answer made and served and filed with the leave of the Court first had and obtained, and that it is supported by proof brought before the Court in the testimony, and is also supported by the words, figures and marks appearing in Defendant's Exhibit 1, "Extended 6 months to June 11, 1913," which said exception of the defendant is designated as error No. 17.

That this action was commenced within the limits prescribed by law. [71]

The defendant further excepted to said holding and finding of the Court above recited upon the further grounds that it is against the law and more particularly Section 21 of the Act of June 22d, 1874, therein made and provided, which said holding and finding is designated as error No. 18.

"Some complaint is made as to the manner in which the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it affected the substantial rights of the parties."

To which holding and finding of the Court the defendant objected and excepted upon the grounds that the evidence shows that the appraisement and liquidation there not being computed until September 4th, 1913, and no notice whatever of same was given neither to the importer nor to the surety the attempted appraisement and liquidation did not constitute such an appraisement and liquidation as would make the defendant liable under his bond in the action herein, and that same and the forbearance of the plaintiff to seize and confiscate the goods

in pursuance to the provisions of law did affect and greatly prejudice the substantial rights of the defendant herein, to wit, to enlarge his liability under the bond from \$5,000 worth of goods to \$15,588, and on the duty thereupon from \$3,000 to 9,726.16 and to deny to him and to set to naught the substantial compliance by said defendant of his conditions of the bond such as the plaintiff represented it to be, to wit, the redelivery of \$5,852 worth of goods upon which the duty was computed at \$3,617.34, which said holding and finding is designated as error No. 19.

“As already stated, that bond is not conditioned as required by law as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in *United States vs. Dicerhoff*, 202 U. S. 302: [72]

“While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly required by the statute.”

To which holding of the Court the defendant objected and excepted upon the grounds that the use made of the bond of the defendant by the plaintiff without his assent thereto was and is as shown by the *cordence* adduced a substitution of the remedy provided by statute in such case, to wit, the payment or duties by the importer prior to delivery for goods

entered for consumption under section 2899 of the Revised Statutes, and in case same or any goods entered are undervalued to the extent that these goods are shown by the testimony to have been, seizure and confiscation of same; and such use as was made of the said bond in the case at bar is against the law therein made and provided and as tending to render uncertain the liability of a surety under customs bond and is against public policy and *malum in se*, which said holding of the Court is designated as error No. 20.

“Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. It has breached that condition and the loss to the United States exceeds the penalty of the bond.”

“On the whole I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond, and judgment will go in its favor for the amount of such penalty.”

To which findings and holdings of the Court the defendant objected and excepted upon the grounds that the evidence produced before the Court in this case shows that if the [73] United States has been damaged, in excess of \$6,000 or at all, it is primarily and directly by reason of the dereliction or failure of its agents to apply the laws, rules and regulations therein made and provided, and not by reason of

any fault or breach on the part of the defendant herein, which said finding and holding is designated as error No. 21.

And the defendant further there and then objected and excepted to the said decision of the Court and to the whole thereof, and now does hereby except and specifies the same as error No. 22.

And thereafter, to wit, on the 13th day of March, 1917, and upon said decision the clerk of this Honorable Court, entered judgment in favor of the plaintiff and against the defendant for the sum of Six Thousand Seven Hundred Ninety-eight and no/100 (\$6,798.00) Dollars, and costs taxed at \$29.10, which judgment was and is in the words and figures following, to wit:

No. 15,878.

(Title of Court and Cause.)

JUDGMENT.

This cause having come on regularly for trial upon the 6th day of February, A. D. 1917, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties, Ed. F. Jared, Assistant United States Attorney, appearing on behalf of the plaintiff and T. C. West and F. de Journal, Esqrs., appearing on behalf of the defendant; and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court,

after due deliberation, having filed its memorandum opinion and ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of \$6,000.00, together with interest at seven per cent per annum from April 19, 1915, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that United States of America, plaintiff, do have and recover of and from Illinois Surety Company, a corporation, defendant, the sum of Six Thousand Seven Hundred Ninety-eight and no/100 (\$6,798.00) Dollars together with its costs herein expended taxed at (\$29.10).

[74]

Judgment entered March 13, 1917.

WALTER B. MALING,

Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,

Clerk.

To which judgment and the whole thereof defendant then and there objected and excepted, and does hereby except and specifies the same as error No. 23.

The foregoing constitutes all the proceedings had upon said trial.

WHEREFORE, the defendant presents the above and foregoing as a full, true and correct bill of exceptions of all the proceedings had upon said trial

and of its objections and exceptions, and prays that the same may be settled and allowed as such.

T. C. WEST,
F. de JOURNEL,
Attorneys for Defendant.

Dated 27 April, 1917.

Service of the foregoing draft of bill of exceptions proposed by defendant is admitted on this 2d day of April, 1917.

ED. F. JARED,
Attorney for Plaintiff. [75]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 15,878.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ILLINOIS SURETY CO., a Corporation,

Defendant.

**Stipulation Re Transmission of Original Exhibits
to Appellate Court, etc.**

It is hereby stipulated and agreed that the above and foregoing is a full, true and correct bill of exceptions of all the proceedings had upon the trial of the above-entitled action; that the original exhibits referred to in the testimony hereinbefore set forth may, with the leave of the Court upon order first

had and obtained in that behalf, be transferred and delivered to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be produced and used in said court, upon the review of this cause, and that the foregoing bill of exceptions may be signed and settled and be used as such bill of exceptions upon the hearing by the United States Circuit Court of Appeals for the Ninth Circuit, of this cause.

Dated 27th April, 1917.

And it is further stipulated and agreed that the order of approval of said bill of exceptions may be made outside of the jurisdiction of the above-entitled Court.

JNO. W. PRESTON,

U. S. Atty.,

ED F. JARED,

Asst.,

T. C. W.

Attorneys for the Plaintiff.

F. deJ.

T. C. WEST,

E. F. J.

F. de JOURNAL,

Attorneys for the Defendant.

The foregoing bill of exceptions is true and hereby settled and allowed.

• FRANK H. RUDKIN,

Judge.

[Endorsed:] Filed May 7, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [76]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,
Defendant.

Assignment of Errors.

Comes now the above-named defendant and says: that the decision rendered and the Judgment entered by this Honorable Court on the 13th day of March, 1917, in favor of the plaintiff and against the defendant, are erroneous and unjust, and now files the following assignments of error upon which it will rely in the review of the said decision and judgment of said Honorable Court so rendered and entered in the above-entitled cause as aforesaid.

I.

The Court erred in overruling the amended demurrer of the defendant to the complaint.

II.

The Court erred in overruling the objection of the defendant to the testimony of C. L. Marple, a witness for the plaintiff who testified as follows:

“According to the record, I know that Mr. Grazi got possession of these goods—

“Defendant’s counsel interrupting witness objected thereto as being immaterial, irrelevant and in-

competent and assuming something not in evidence, there being no evidence showing that Grazi ever got these goods; which objection was overruled and defendant excepted. [77]

“The COURT.—He is asking if he knows. The witness was going to speak from the record. That is apparently the only information he has.

“WITNESS.—Grazi apparently got the goods at the date of entry. I have no personal knowledge.”

III.

The Court erred in overruling the objection of the defendant to the testimony of said C. L. Marple regarding the object and construction by said witness of that certain bond in writing there and then before the Court, which said testimony was as follows:

Mr. JARED (to Witness.)—Are you familiar with the ten-day bond that was given in this case? Just state the object of that bond, if you know.

“To which the defendant objected, which objection was overruled by the Court, which ruling is designated in the bill of exceptions as error No. 4, and thereafter the said witness testified as follows:

“This penal bond was given for the return to the Government’s custody of any of the goods or effects in the possession of the importer up to and including ten days from the official return of the appraiser. The official return of the appraiser was made some time in January, 1912; this bond lives for ten days after the date of that return; it then expires. The return dated September 4th, 1913, is the liquidation based on the Appraiser’s return of January 8th,

1912. This bond does not last until ten days after the liquidation of the articles, but lasts until ten days after the return of the appraiser, that is noted on the invoice. This is the official invoice. There is the date of the official return, January 8th, 1912. This \$10,000 bond was good for ten days after that."

IV.

The Court erred in ruling and holding that the plaintiff had made a case sufficient to put the defendant on his defense by proving that the defendant had admitted that the bond set forth in the complaint [78] had been executed by said defendant, to which said ruling and holding of the Court the defendant excepted and designated as error No. 7, upon the grounds that it was error of the Court to permit the copy of the said bond to be made evidence dispensing the plaintiff with the production of the original there and then in court and in the possession of the plaintiff and for all times prior thereto, since it was made in the possession and custody of the plaintiff, in view of the fact disclosed to the Court by the plaintiff's counsel that the said original bond, if produced, would disclose the fact that it had been materially altered by said plaintiff in that a second extension of six months for the return of the goods by the principal to the plaintiff had been granted to said principal without the assent or knowledge of the defendant, thus compelling the defendant to enter upon his defense in order to have the said original bond entered in the record and admitted in evidence to the end that the Court may see the alteration and second extension endorsed thereupon.

V.

The Court erred in refusing to grant the motion of the defendant for a nonsuit and to render a judgment for the defendant at the close of the plaintiff's evidence.

VI.

The Court erred in refusing to hear the defendant's argument and authorities for a nonsuit at the close of the plaintiff's evidence, unless said defendant there and then bound itself by its counsel to abstain from adducing evidence and put in its defense in the event that the decision of the Court be against said defendant after the hearing by the Court of the said argument and the production of the authorities offered in support thereof.

VII.

The Court erred in denying the application of the defendant to amend its second amended answer by setting forth therein that defendant corporation had gone into the hands of a receiver. [79]

VIII.

The Court erred in finding ruling and holding as follows:

"This is an action by the United States to recover the amount of the penalty of the redelivery bond, executed by the defendant as surety for one Pierre Grazi conditioned that Grazi, or the defendant, would redeliver certain theatrical scenery, properties and apparel to the collector of the port of San Francisco, and enter the same for exportation from the United States within six months from the date of exportation."

Because paragraphs V, VIII, and X of the complaint show same to support an action for duties and not an action for the recovery of any penalty, that if the action be for duties the defendant is not liable therefor under the terms and conditions of the bond sued upon, and if the action be for a penalty, the complaint herein is insufficient to support a judgment thereupon.

IX.

The Court erred in finding, ruling and holding as follows: "It appears from the testimony that Grazi, the proprietor of a theatrical exhibition at San Francisco, imported from the Republic of France to the United States, certain theatrical scenery, properties and apparel. That such properties arrived in the port and collection district of New York, in the State of New York, on the 4th day of November, 1911, and were brought thence under an immediate transportation order to the port of San Francisco, where the same were entered on the 11th day of November, 1911, as of the value of \$5,000."

Because the uncontradicted evidence upon the trial of said cause shows that the said properties were, to the knowledge of the plaintiff, imported in the United States, to wit, in the port of New York, not by Grazi, but by one Jules Moyreaud, and were shipped thence by him, said Moyreaud, consigned to said Grazi in San Francisco, which the defendant did not know. [80]

X.

The Court erred in finding, ruling and holding as follows: "After entry the goods were appraised ac-

according to law and the calculation fixed at \$15,558. The duty thereon computed according to law was \$9,726. Upon the execution of the latter bond the goods were surrendered to Grazi, and thereafter and within the time limited by law, a portion thereof, of the appraised value of \$3,617.34 were delivered to the collector and exported; but the balance of the goods, subject to a duty of \$6,108.66, have never been exported from the United States or delivered over for exportation.”

Because as a matter of law, for the lack of any notice to the importer Grazi or to the surety defendant herein or to any other person on their behalf of the said appraisement and of the said liquidation, no lawful appraisement or lawful liquidation were made and completed and because the evidence upon the trial of said cause shows that only a minor portion of said goods (if any at all) were surrendered to said Grazi, the major part being delivered to persons other than Grazi without the consent of the defendant herein and such deliveries were made long after the execution of the bond, to wit, on or about the 4th day of January, 1912.

XI.

The Court erred in finding, ruling and holding as follows:

“It is first contended that the existence of the other bond in the sum of \$10,000 given under section 2899 of the Revised Statutes, avoids the bond now in suit. As already stated, it is not apparent to the Court why the other bond was taken. That bond is only required where goods are delivered to the consignee

pending inspection and appraisement. Here there was no delivery of the goods to the consignee until delivery was made under the bonds in suit, so that the former bond never became operative, never served any purpose and cannot defeat the present action."

Because it appears clearly from the evidence on the trial of said cause that the plaintiff knew, but the defendant did not know, that said goods having imported by Jules Moyreud in the port of New York and consigned and shipped by him to said Grazi to San Francisco, said Grazi not being the importer who brought in said [81] goods, they were not entitled to admission free of duty, whereupon plaintiff procured the \$10,000 bond under the provisions of section 2899 and held said goods pending appraisement under said bond until about the 8th day of January, 1912, when said appraisement being completed, and the plaintiff having acquired full knowledge that said goods had been undervalued, delivered them, notwithstanding, to various parties, purporting there and then and not theretofore to put the \$6,000 into force and effect by the proffering of its consideration, which was the delivery of the said goods to said Grazi and to no other person.

XII.

The Court erred in finding, ruling and holding as follows:

"Again it is claimed that the bond in suit was void because Grazi did not accompany the importation. If we concede that the goods should not have been admitted free of duty unless accompanied by the importer or manager, nevertheless they were so ad-

mitted, and the defendant should not now be permitted to go behind the recitals of the bond. Again it is claimed that the Government should have forfeited the goods for undervaluation. But I apprehend the right of forfeiture was given for the protection of the Government and not for the protection of the importer or his surety."

Because it appears from the evidence on the trial of this cause that at the time of the making of the bond the plaintiff knew and the defendant did not know that the goods were not brought in by the said Grazi but were brought in by one Jules Moyreaud and shipped and consigned to Grazi by Moyreaud, and therefore not entitled to come in free of duty on the security of the bond and on the security of the ownership by Grazi of the said goods, Moyreaud appearing by the recitals of Exhibit "I" to be the owner of said goods and the recitals of the said bond, which were erroneous and which the plaintiff knew, but the defendant did not know, to be erroneous, induced the defendant to enter into and execute said bond, said inducement being that the defendant relied: 1st, upon the implication that he was safe in executing a bond given under the protection of law after all the Statutory requirements governing the admission of goods free of duty under section 656 of the Statute had been fulfilled as to the past transaction [82] and 2d, as to any future transaction that the plaintiff would in compliance with the requirements of the statute confiscate the goods if they had been fraudulently undervalued, and commit no act of forbearance towards the importer Grazi by

abstaining to apply such statute regarding confiscation, as would result in rendering the defendant liable, unbeknown to him, for a greater sum than he agreed knowingly to secure, to wit, the lawful duties on \$5,000 worth of goods.

XIII.

The Court erred in finding, ruling and holding as follows:

“It is suggested that the goods were not delivered to Grazi but to members of the troupe. The redelivery, however, to Grazi is explicitly admitted in the answer, and in any event the delivery made to the members of the troupe with his consent and acquiescence was equivalent to a delivery to him.”

Because it appears from paragraph VII of the first defense in the second amended answer of the defendant that the delivery therein referred to is the delivery of \$5,000 worth of goods and no more purported to have been entered, valued, and appraised, before the bond now sued upon was executed, which said \$5,000 worth of goods were, and believed by the defendant to have been, lawfully thus entered, valued and appraised, and also because the consideration moving from the defendant to the plaintiff for the bond was to be the delivery to Grazi of such an amount of goods lawfully entered and lawfully valued and not the delivery to various other persons of a treble amount of goods fraudulently entered and fraudulently valued, to the knowledge of the plaintiff and with plaintiff's consent, but without the knowledge or consent of the defendant, and that the acquiescence of Grazi to such an unlawful transac-

tion of the bond now sued upon is not binding upon this defendant under the conditions.

XIV.

The Court erred in finding, ruling and holding as follows:

“It is claimed that the surety was released by an unauthorized extension of the time for the exportation of the goods. This defense is not raised by the answer, nor is it supported by the proof. The only evidence of such extension is a notation on the face of the bond made sometime after its execution, but by whom or when made, is not disclosed.” [83]

Because it appears in the defendant's third defense of his second amended answer, made, served and filed with the leave of the Court first had and obtained, that said defense is properly raised, and because it also appears from the testimony of record that it is supported by sufficient proof, and it also appears from the testimony that the bond was and has been ever since its execution, and until it was produced and filed in court, in the control and custody of the plaintiff, and that the words appearing thereupon endorsed, “Extended 6 months to June 11, 1913,” were presumably so endorsed and written thereupon by the plaintiff, in whose custody said bond always remained, which said fact is duly corroborated by the fact that in pursuance thereto it may be fairly concluded from the testimony that said plaintiff abstained to make any demand from the defendant or from said Grazi for the return and redelivery of the said goods or for the payment of any penalty or duty or to enter any action therefor, and

that said plaintiff further abstained from perfecting any liquidation or computation of said duties or of the value of the said goods, until said second extension had fully expired to wit, until the 4th day of September, 1913.

XV.

The Court erred in finding, ruling and holding as follows:

“The defendant also interposed the statute of limitations as a defense. The statute in question will be found in Federal Statutes, Annotated, Vol. 2, page 761, and provides that no action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws of the United States, shall be instituted, unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued. It is at least doubtful whether the statute has any application to actions upon written instruments, but in any event there was no breach of the condition of the bond, until there was a failure to export the goods one year after November 11, 1911, and this action was commenced well within the limits prescribed by law thereafter.”

Because said finding, ruling and holding is against the statute therein made and provided and applicable to cases like the case at bar, to wit, Section 21 of Chapter 391, the Act of June 22d, 1874, U. S. Stats. at Large, Vol. 18, page 190, and the statute applied by the Court and cited is not applicable thereto.

XVI.

The Court erred in finding, ruling and holding as follows:

“Some complaint is made as to the manner in which the appraisement was made, and while no doubt there were some irregularities and unusual delay, I cannot say that it affected the substantial rights of the parties.”

Because it appearing from the evidence upon the trial of this cause that the appraisement and liquidation were not completed until the 4th of September, 1913, and no notice of the increase over the valuation according to law being given either to the importer or to the surety, such attempted appraisement and liquidation being incomplete and therefore null and void and of no force or effect did not, in law bind or render the defendant liable on its bond and by reason thereof, and because of the forbearance of the plaintiff to seize and confiscate the goods in compliance with the mandatory directions of the statute, the substantial rights of the defendant were materially affected and injured and prejudiced in that his liability under the bond was enlarged from the duty on \$5,000 worth of goods to the duty on \$15,588 of goods, and for the said duty thereupon from \$3,000 to \$9,726.16, and that no allowance was made to him for his substantial compliance with the conditions of the bond, that is, the redelivery by him of \$5,852 worth of goods upon which the duty was \$3,617.34.

XVII.

The Court erred in finding, ruling and holding as follows:

“As already stated, that bond is not conditioned as required by law as it is conditioned for a redelivery of the goods and not for the payment of the duties. But as said by the Supreme Court in *United States vs. Dickerhoff*, 202 U. S. 302: While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter with the statute and is neither *malum prohibitum* nor *malum in se*, it is a valid bond although not in terms directly required by the statute.”

Because the plaintiff, with knowledge of the manner and circumstances under which the goods were entered and imported, unbeknown of the defendant, as it appears from the evidence, made such use of the bond [85] now sued upon, without the assent of the defendant, as was forbidden by the statute to wit, used the instrument as a bond for the payment of duties on goods entered for consumption under section 2899 and not as a bond for redelivery of goods lawfully entered under section 656 of the tariff act of August 5th, 1909, which was a substitution of remedy unauthorized by the statute and without the assent of the defendant thereto, and because said bond was further used as a substitute remedy without the assent of the defendant in that the plaintiff with knowledge of their fraudulent undervaluation, concealed same from the defendant and in lieu of the seizure and confiscation prescribed by law, after having acquired such knowledge, caused said goods to be

delivered to Grazi or to various other persons relying upon the security of said bond to be made use of, in a manner not provided for and to an extent exceeding the amount of liability agreed for thereunder, thereby tending to render uncertain the liability of a security under customs bond and therefore against public policy and as such *malum in se*.

XVIII.

The Court erred in finding, ruling and holding as follows:

“Other objections are urged by the defendant, but I find them without substantial merit. The defendant obligated itself to return these goods or to cause them to be returned for exportation. It has breached that condition and the loss to the United States exceeds the penalty of the bond. On the while I find that there is no substantial defense to the action, that the United States has been damaged in excess of the penalty of the bond and judgment will go in its favor for the amount of such penalty.”

Because the evidence upon the trial of said cause shows that if the plaintiff has been caused to suffer loss and damage, it was due directly and primarily to the dereliction and failure of duty of its agents to apply the laws and regulations therein made and provided and not by reason of any fault or breach on the part of the defendant.

XIX.

The Court erred in finding for the plaintiff and against the defendant and in refusing to find for the

defendant and against the plaintiff in the above-named cause. [86]

XX.

The Court erred in adjudging that the plaintiff shall recover the sum of six thousand seven hundred and ninety-eight dollars and costs taxed at \$29.10 from the defendant.

XXI.

The Court erred in adjudging that said plaintiff shall recover from the defendant any sum.

XXII.

The Court erred in finding, ruling and holding that the evidence was sufficient to support or justify the decision and memorandum opinion findings rendered in said cause on the 13th day of March, 1917, and upon which said judgment is based.

XXIII.

The Court erred in not holding as a matter of law that if the plaintiff suffered any damages, it was by reason of its neglect and failure to apply the law therein made and provided.

XXIV.

The Court erred in not rendering and entering a decision, opinion and judgment against the plaintiff and in favor of the defendant to the effect that the plaintiff take nothing in this action.

WHEREFORE the defendant prays that said Judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

F. de JOURNAL,
T. C. WEST,
Attorneys for Defendant.

Copy of assignment of errors received and due service of same acknowledged this 19th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jun. 19, 1917. Walter B. Maling, Clerk. [87]

(Caption and Title.)

Petition for Writ of Error and Bond.

Illinois Surety Company, a Corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the Court and the judgment entered on the 13th day of March, 1917, comes now by T. C. West and F. de Journal, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security for costs which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security said writ of error may be allowed and thereafter determined by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

T. C. WEST,
F. de JOURNAL,
Attorneys for Defendant.

Dated Aug. 27, 1917.

Receipt of a copy of the within petition for Writ of Error on the 27th day of Aug., 1917, is hereby admitted.

JNO. W. PRESTON,
Attorney for the Plaintiff.

[Endorsed]: Filed Aug. 27, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [88]

(Caption and Title.)

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of T. C. West, Esq., of counsel for defendant, and upon filing a petition for a writ of error and an assignment of errors:

IT IS ORDERED that a writ of error *is* and hereby is allowed to have reviewed in the United Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at Three Hundred (\$300) Dollars.

Dated this 27th, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 27, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

(Caption and Title.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, The Illinois Surety Company (a Corporation), as principal, and National Surety Company of New York, as sureties, are held and firmly bound unto the United States of America, plaintiff above named, in the sum of Three Hundred Dollars, to be paid to said plaintiff, for which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, our heirs, executors, administrators, assigns and successors, firmly by these presents.

Sealed with our seals and dated this 30th day of August, 1917.

WHEREAS, the above-named defendant has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the Northern District of California.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant shall prosecute said writ to effect and answer all costs, if it shall fail to make good its plea, then this obliga-

tion shall be void; otherwise to remain in full force and virtue.

[Notarial Seal Illinois Surety Co.]

THE ILLINOIS SURETY CO.,

By T. C. WEST and

F. de JOURNEL,

Its Attorneys.

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,

Attorney-in-Fact. [90]

State of California,

City and County of San Francisco,—ss.

On this thirtieth day of August, in the year one thousand nine hundred and seventeen, before me, Julius Calmann, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert, acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal, at my office in the City and County of San Francisco, State of Cali-

fornia, the day and year in this certificate first above written.

[Seal] JULIUS CALMANN,
Notary Public in and for the City and County of San
Francisco, State of California.

Approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 31, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

(Caption and Title.)

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Please prepare transcript of record in the above-entitled suit and incorporate therein the following portions of said record only, to wit:

Complaint.

Amended demurrer to complaint.

Ruling of Court on said demurrer.

Leave of Court to make and file second amended answer.

Second amended answer.

Opinion of Court.

Judgment.

Engrossed bill of exceptions.

Orders settling bill of exceptions and to transfer original exhibits.

Original exhibits (to be produced and transferred
but not printed).

Assignment of errors.

Petition for order for writ of error and that amount of bond be set.

Order granting writ of error and fixing amount of bond.

Bond, justification of sureties and approval thereto by Judge.

Writ of error.

Citation with admission of service by United States attorney for plaintiff.

This Praecept with stipulations therein as to contents and printing. Certificate of clerk of District Court. [92]

And it is hereby agreed and stipulated between counsel for plaintiff and defendant in the above-entitled action that the foregoing comprise all the papers, exhibits and other proceedings necessary or which need be included by the clerk of the above-named court in making up his return to said writ of error as part of such record and that in the printing of the said record for the consideration of the Appellate Court all captions and indorsements should be omitted after the title of the Court and cause has been printed in full on the first page thereof and that in place and stead the words "Caption and Title" and the name of the paper may be substituted together with file-marks if any.

Dated at San Francisco, this 10th day of May, 1917.

ED. F. JARED,
Attorney for Plaintiff.
F. de JOURNAL,
Attorney for Defendant.

[Endorsed]: Filed Aug. 31, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

*In the Southern Division of the United States Dis-
trict Court, in and for the Northern District of
California, Second Division.*

No. 15,878.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ILLINOIS SURETY CO., a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing ninety-three (93) pages, numbered from 1 to 93, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$41.20; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of September, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [94]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
'the Honorable, the Judges of the District Court
of the United States for the Northern District of
California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, plaintiff in error, and Illinois Surety Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Illinois Surety Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date thereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the *the* said Circuit Court of Appeals may cause further to be done [95] therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 31st day of August, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
District Judge.

Receipt of a copy of the within Writ of Error is hereby admitted this 31 day of August, 1917.

JOHN W. PRESTON,
U. S. Atty.,
Attorney for Defendant in Error [96]

[Endorsed]: 15,878. District Court of the United States for the Northern District of California, Second Division. United States of America, Plaintiff, vs. Illinois Surety Company, Defendant. Writ of

Error. Filed Aug. 31, 1917. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [97]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of

error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein Illinois Surety Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 31st day of August, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy of the within Citation is hereby admitted this 31 day of August, 1917.

JOHN W. PRESTON,
U. S. Atty.,

Attorney for Defendant in Error. [98]

[Endorsed]: 15,878. District Court of the United States for the Northern District of California, Second Division. United States of America, Plaintiff, vs. Illinois Surety Company, Defendant. Citation on Writ of Error. Filed Aug. 31, 1917. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3072. United States Circuit Court of Appeals for the Ninth Circuit. Illinois Surety Company, a Corporation, Plaintiff in Error,

vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed October 29, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Enlarging Time to and Including October 20,
1917, to File Record and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error may have to and including the 29th day of October, 1917, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Sep. 28, 1917.

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: No. 3072. United States Circuit Court of Appeals for the Ninth Circuit. Illinois Surety Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Enlarging Time to File Record on Writ of Error and Docket the Cause. Filed Sep. 28, 1917. F. D. Monckton, Clerk. Refiled Oct. 29, 1917. F. D. Monckton, Clerk.

No. 3072

**United States
Circuit Court of Appeals** *2*

FOR THE NINTH CIRCUIT

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the Southern Division of
the United States District Court of the
Northern District of California,
Second Division.

BRIEF OF PLAINTIFF IN ERROR

F. DEJOURNAL,
T. C. WEST,
ROY V. NYE,
Attorneys for Plaintiff in Error.

No. 3072

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ILLINOIS SURETY COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the Southern Division of
the United States District Court of the
Northern District of California,
Second Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This is an action at law on a bond in which one
Grazi, as principal, and the plaintiff in error, Illi-
nois Surety Company (defendant below), as surety,

were the obligors and the United States of America (plaintiff below) was the obligee. Grazi came to this country from France not later than October 1, 1911 (Tr. pp. 71-72), and a number of weeks later, to-wit, on November 4, 1911, the goods described in the bond, to-wit, certain theatrical effects, arrived at the port of New York on the steamer *Caroline* from Havre, France, and were immediately transported by rail thence to San Francisco, under a transportation bond (Tr. p. 30). The goods arrived at San Francisco on November 11, 1911, and on the same day the bond in suit was given. Grazi was the manager of an opera company, and the goods were theatrical scenery, properties and apparel which he designed to have his singers use, and which they did use, in the presentation of operas at San Francisco and other Californian cities.

The complaint (paragraph VI, Tr. p. 2) represents the bond to have been taken under the provisions of paragraph 656 of the tariff act of August 5, 1909. That paragraph provided that theatrical effects might be entered free of duty provided a bond was given "for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation," but the Secretary of the Treasury could extend the time for a further term of six months. The bond in question is set out in full in the complaint (Tr. pp. 3-5), and was conditioned, not for the payment of duties *or* for the exportation of the goods, but simply for the

exportation of the goods; there is therein no mention of and no condition for the payment of duties. And it was conditioned, not for the exportation of the goods generally (so that they might be exported from any port of export in the United States), but for the exportation thereof from the port of San Francisco.

The complaint (paragraphs V, VIII and X, Tr. pp. 2, 5) endeavors to remedy the failure of the bond to include both of the alternative conditions set forth by the statute—the failure to include in the bond the alternative condition that the duties may be paid by the importer; it endeavors to supply this missing condition by alleging (paragraph V) the amount of the duties on the goods, and (paragraph VIII) that a part of the goods, on which the duty was a certain stated sum, were redelivered for exportation, and (paragraph X) that the difference between said two sums, being “the duty on that between said two sums, being “the duty on that portion of said goods not exported or delivered for exportation above set forth, has not been paid, nor any part thereof.” The prayer is for the amount of the *duties* so alleged to remain unpaid (\$6,108.66), though it does also pray “for the penalty of said bond” (\$6,000). But neither on the trial nor in the judgment or opinion of the Court below was the case treated as being for duties, but it was treated throughout as simply an action on the bond. Of course this is the only theory on which the case could possibly be brought against the surety com-

pany, for it was not liable for the duties as such, though Grazi may have been liable therefor.

The surety company demurred on the complaint, generally and also for uncertainty, ambiguity and unintelligibility (Tr. pp. 7-8). The demurrer was overruled, with leave to answer (Tr. p. 9). The defendant answered. The case was tried before the Court without a jury, a jury having been waived by stipulation. On the trial it was shown by the defendant and admitted by the plaintiff (Tr. pp. 71-72) that Grazi came to this country from France many weeks before the goods arrived from France and by an entirely different voyage, whereas the statute, as construed by the Treasury Department and the courts, provides that the goods must come on the very same vessel and at the very same time as the importer, in order to be subject to entry duty-free under a bond for their exportation later on or (as an alternative thereto) the payment of duties thereon. Judgment was given (Tr. p. 22) in favor of plaintiff below for the penal sum named in the bond, \$6,000, that being less than the amount of duty alleged in said paragraph X of the complaint (Tr. p. 5) to remain unpaid; to the said penal sum interest and costs were added. The surety company thereupon sued out this writ of error.

Thus, the vital questions are:

(1) The question raised by the general demurrer whether the complaint states a cause of action at all,—i. e., whether the bond set out therein is not fatally defective and void from every point of

view—as a statutory bond and as a common law bond: void as a statutory bond (a) because of the entire omission therefrom of one of the alternative conditions mentioned in the statute, namely, that the duties might be paid by the importer, and (b) because of the inclusion, in the condition for exportation, of the requirement that the goods be exported through the port of San Francisco only; void as a common law bond on the grounds that there was no basis on which a common law bond could rest and that there was no consideration therefor.

(2) The question arising on the evidence whether, since Grazi came into the country many weeks before the goods came and not at all at the same time or by the same vessel as they came, and since he was not in actual possession of the goods when they came, the conditions under which any bond whatever could be exacted and taken by the government were not entirely lacking in an absolutely essential particular, and whether the bond is not therefore entirely void.

For the sake of convenience this latter question will be hereinafter considered first, and then the former question will be dealt with.

The surety company has assigned and now relies on the following errors:

SPECIFICATION OF ERRORS

1. The Court erred in overruling the amended demurrer of the defendant to the complaint (Assignment of Error No. I, Tr. pp. 92).

2. The Court erred in adjudging that the plaintiff shall recover the sum of six thousand seven hundred and ninety-eight dollars and costs taxed at \$29.10 from the defendant (Assignment of Error No. XX, Tr. p. 106).

3. The Court erred in not rendering and entering judgment against the plaintiff and in favor of the defendant to the effect that plaintiff take nothing by this action (Assignment of Error No. XXIV, Tr. p. 106).

ARGUMENT*

There are certain propositions which we think will appear clearly as we proceed. They are: (1) Theatrical effects are "implements, instruments, and tools of trade, occupation or employment;" (2) where theatrical effects are brought into this country from a country across the sea, as these were brought from France, they must come on the very same vessel and at the very same time as the importer, in order to be entitled to free entry under a bond for exportation or payment of duties later,—unless they come at the same time and on the same vessel as the importer they do not fall within paragraph 656 of the tariff act of 1909 and therefore no valid bond for duties or exportation can be taken under the terms thereof; (3) the bond in suit is not a statutory bond under paragraph 656 of the act of 1909 because the plain terms of that paragraph cannot be and are not met by a bond conditioned, as this one is, for only one of two alterna-

* Note: Italics in this brief are ours.

tives, either of which the importer has a right to avail himself of—to-wit, either to export *or* pay the duties on the goods; (4) even the one condition actually expressed in the bond, viewed by itself and apart from the considerations just mentioned of failure to express alternative conditions, is not in accordance with the statute, and the bond is invalid as a statutory bond, because the law and customs regulations permit the importer to export through *any* port of the United States, while the bond in suit requires exportation to be through the port of San Francisco; (5) the bond is not good as a common law obligation.

Theatrical Effects are Tools of Trade, and Must Come on the Very Same Vessel and at the Very Same Time as the Importer.

The true nature of the provision regarding entering theatrical effects duty-free on a bond conditioned for exportation within six months (or a year) or the payment of duties, will be better seen if we take a view of its genesis, history and associations.

In the free list of the act of March 2, 1861, 12 Stat. at Large 178, 196, Chap. 68, §23, occurs the following paragraph:

“Wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation, or employment of persons arriving in the United States: *Provided*, That this exemption shall not be construed to include

machinery, or other articles imported for use in any manufacturing establishment, or for sale."

This paragraph was carried into the Revised Statutes practically unaltered, §2505, p. 489.

The law of March 3, 1883, 22 Stat..at Large 488, 521, Chap. 121, simply continued the provision of the Revised Statutes on this subject.

The law of October 1, 1890, 26 Stat. at Large 567, 609, Chap. 1244, paragraph 686, for the first time devotes a separate paragraph (apart from "wearing apparel") to instruments, etc., of trade, occupation, or employment (and in subsequent laws they have continued to enjoy a separate paragraph). Moreover, and significantly, the language is changed so as to make it clear that the goods *must come with* the person bringing them. Theretofore, as we have seen, the law read "tools of trade * * * of persons *arriving* in the United States." But the law of 1890 reads as follows:

"686. Professional books, implements, instruments, and tools of trade, occupation, or employment, *in the actual possession at the time of persons arriving* in the United States; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale."

For the first time theatrical effects are expressly mentioned in the law of August 27, 1894, 28 Stat. at Large 509, 543, Chap. 349, paragraph 596, and

that law was the first to require either of the conditions ever since then and now required, namely, that the goods be exported within a given time or the duties thereon be paid. Said paragraph 596 is in the following words:

“596. Professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of persons arriving in the United States; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale, nor shall it be construed to include theatrical scenery, properties, and apparel, but such articles brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other person and not for sale and which have been used by them abroad shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation: *Provided*, That the Secretary of the Treasury may in his discretion extend such period for a further term of six months in case application shall be made therefor.”

The law of July 24, 1897, 30 Stat. at Large 151, 200, Chap. 11, paragraph 645, is in the same words exactly except that the words “arriving in” are changed to “emigrating to.”

In the law under which the bond in this case was given, 36 Stat. at Large 11, 78, Chap. 6, paragraph 656, there was a still further "tightening up" of the phraseology restricting the importation to the very time of arrival of the person bringing the goods, by changing the clause reading "in the actual possession at the time of persons arriving in the United States" so as to make it read "in the actual possession at the time of *arrival*, of persons emigrating to the United States." Except in this particular the paragraph remains exactly the same as the corresponding paragraphs in the acts of 1894 and 1897.

Since, before there was any express mention of them, theatrical effects had already been held both by the Department and the courts to be implements or instruments of employment within the meaning of the tariff paragraph applying to tools of trade, there appears to have been no reason for expressly mentioning them in the act of 1894 (the first law to designate them expressly) and subsequent laws, except for the purpose of setting forth the restrictions then for the first time imposed on theatrical effects, over and above the restrictions imposed on other tools of trade, namely, that though *admitted* duty-free they must be exported within a year, at the longest, or else duty must be paid on them.

In other words, by the laws of 1894 and subsequently, all the restrictions as to other tools of trade (that they must not be brought for any other person or for sale, or be brought on any other ves-

sel or at any other time than the importer) were retained as to theatrical effects, and more restrictions were added—they must be exported within a year or duty must then be paid, and bond to secure the performance of one of these alternatives must be given.

It is clear from the history of the provision that it is intended that theatrical effects shall be brought on the very same vessel on which the person comes who brings them. This appears from the following: *First.* They were not mentioned expressly in any act prior to 1894, but were assimilated to and included among wearing apparel, implements, instruments and tools of trade at all times from 1861 to 1890 (for only from and after 1890 were they, with other tools of trade, given a paragraph separate from wearing apparel). Now, wearing apparel of course comes with the immigrant, in his hand or in his trunk; it arrives on the same steamer with him. *Secondly.* And in the very law (that of 1890) which thus gave tools of trade a separate paragraph, language was introduced with should make amends for taking tools of trade out of the paragraph concerning wearing apparel; the very juxtaposition to wearing apparel, so long as tools of trade were in the same paragraph, would naturally lead to the interpretation that they must come with the importer, and on the same steamer; when that juxtaposition was destroyed, the naked word “arriving” was replaced by the words “in the actual possession at the time of persons arriving.” Could language make

it more clear that "tools of trade" *must* come on the very same vessel as the immigrant in order to be entitled to free importation, except by using the very words "on the same vessel"? *Thirdly*. As if intending to introduce the equivalent of the very words "on the same vessel" the wording of the provision was changed in 1909 by stating that the tools of trade must not only be in the actual possession at the time of persons arriving but must be "in the actual possession *at the time of arrival* of persons emigrating to the United States." Bearing in mind that immigrants may come not only by vessel from across the ocean, but by train from Mexico or Canada, or by horses and wagon, or automobile, or even afoot, from either of the latter countries, it is clear why the general language "in the actual possession at the time of arrival of persons emigrating to the United States" was used instead of the more special language, "on the same vessel," or "on the same vessel or train," or even "by the same means of conveyance." The general language used covers all of these special cases and more, for it covers coming in afoot carrying one's tools of trade or pushing them in a hand-cart. But the words of the statute are just as insistent as any of the alternative but more special expressions just suggested that the goods must come *at the very same time as* and *with* the person.

We take it that no doubt can reasonably exist that theatrical scenery, properties, and apparel are "implements, instruments, and tools of trade, occupa-

tion or employment," and that the same restrictions are to be applied to them—as regards their coming in at the very same time and on the same vessel—as are applied to other tools of trade. Several things establish this conclusively: (1) they have been uniformly *held* to be tools of trade—even before they were expressly mentioned in the statutes they were so held to be by the Treasury Department, and since they were expressly mentioned they have been so treated by both the Treasury Department and the courts; (2) in *reason* they are tools of trade; (3) the *form of the statute* shows that congress recognized and treated them as tools of trade.

The decisions of the Department and the courts have recognized theatrical effects as tools of trade. On February 4, 1893, under the act of 1890 and before the first tariff act was passed which contained an express mention of theatrical effects in connection with "tools of trade," etc., it was held, T. D. 13796, in regard to certain scenery imported by Madame Sara Bernhardt from Australia and landed at San Francisco to be used by her in the play "Theodora," as follows:

"We find that the said goods are the instruments or implements of the occupation of Madame Bernhardt in her actual possession at the time of her arrival in the United States

* * * ."

The report of *Henderson v. United States*, 66 Fed. 53, shows that both the Treasury Department and the Circuit Court of Appeals, Second Circuit, con-

sidered theatrical effects as tools of trade under the law of 1890.

Next, as to the reason of the matter. The purpose of the provision is clearly to admit duty-free the tools, implements and instruments—in one word, the instrumentalities—by which the immigrant has been accustomed to obtain his livelihood. It embodies an exception to dutiable objects, an exception based on reasons of public policy; for it is matter of public policy to permit immigrants to land in this country fully equipped, so far as may be, with the means and facilities for earning a livelihood immediately. Hence they are permitted to bring with them duty-free such instrumentalities as they have been accustomed to use in acquiring a livelihood abroad. And are not the togas, swords and shields of Brutus, Cassius and Caesar as much the instruments of employment of the actors who play those characters as the saw, hammer and square of a carpenter are his instruments of employment?

Lastly, as to the view of congress as expressed in the statute itself. As a matter of construction and interpretation, we find that the paragraph forbids the importation of theatrical scenery, properties and apparel “for any other person,” just the same as it forbids the importation of other implements of trade for any other person. And it forbids importation of theatrical effects “for sale,” just as it forbids importation of other tools of trade for sale. As to these restrictions there is a complete parallel, or, rather, identity.

But there is one restriction on the importation of theatrical scenery, properties and apparel which is not made against the other professional implements and instruments of employment, namely, the provision that they "have been used by them abroad." Undoubtedly the *spirit* of the statute is that the implements of employment first mentioned therein (i. e., those other than theatrical effects) shall have been used abroad by the persons bringing them to this country. In Treasury Decision 10916, under the law of 1890, it was held that law books bought by an American lawyer while abroad, but not used by him while abroad, and brought by him on his return, were not free. And as far back as under the law of 1861, as carried into the Revised Statutes, namely, in 1875, it was held, Treasury Decision 2369, that immigrants cannot bring with them free of duty *new* implements of their profession or trade, though intended to be used by them in the exercise of their profession or trade in the United States. And in order to leave no room for doubt that this is the correct interpretation congress inserted in the next (i. e., the present) general tariff law, act of October 3, 1913, 38 Stat. at Large, Part I, p. 114, Chap. 16, paragraph 582, the words "owned and used by them abroad" as a qualification or restriction on importation of the professional instruments first mentioned therein, i. e., those other than theatrical effects.

But in the law of 1909 there is no express restriction to the effect that tools of trade other than

theatrical effects must have been used abroad by the immigrant. Hence, in this restriction in the law of 1909 as to theatrical effects, there is an apparent intention to insure the bona fides of the importation by forbidding the importation of any but costumes, scenery, properties, etc., which have actually been used abroad "by them."

What is the significance of the provision limiting to six months or a year the presence, duty-free, in this country of theatrical effects, whereas there is no such limitation on other instruments of employment? We do not regard this as a restriction on importation of such effects of the same nature as the restriction against importing for another person or for sale. It was not inserted from the same policy. It is imposed because of the *character* of the theatrical business—because of the differences between it and other "trades, occupations and employments." A carpenter will need his saw and hammer as long as he is able to work. But an actor does not play the part of Mark Antony continuously all his life long; he plays that part one season and another the next. In the regular course of the theatrical business it runs by "seasons" or years. The statute is designed to meet the necessities and realities of the particular trade and employments. So far as theatrical scenery, properties and apparel are concerned these necessities and realities are met in the main and generally, by permitting importation duty-free, for a period of six months, or, in exceptional cases, one year. That, we

take it, is the reason why a period is fixed during which, only, theatrical effects may remain duty-free, in the country. The reason of this limitation does not extend to other implements of employment and hence congress did not extend the limitation to the latter. Therefore, we do not contend that this restriction, as to time, on theatrical effects, manifests, in itself, a disposition on the part of congress to impose greater limitations on the importation of theatrical effects than on the importation of other implements of employment. In each case the importation, duty-free, is permitted so far as the necessities of the case require, as those necessities exist usually and in the regular course of things.

But while we do not base on the limitation as to time any argument that congress designed to impose a greater limitation on the importation of theatrical effects than on the importation of other implements of employment (in each instance the limitation or lack thereof being controlled by the natural duration of the use of the "instrument" imported), we do maintain that there is every reason to view the limitations on importation of theatrical effects as *not less narrow* than the restrictions on the importation of said other implements of employment.

We have already seen that no person who brings in either theatrical effects or other instruments of employment *for sale* is entitled to have them entered duty-free. The same is true of all instruments of employment brought in *for any other per-*

son. And as to instruments of employment other than theatrical scenery, properties and apparel, there is the further condition that they must be "in the actual possession at the time of arrival, of persons emigrating to the United States." Is there such a condition as to theatrical scenery, properties and apparel? As we understand the statute, there is. It prescribes that such articles must be "brought by proprietors or managers of theatrical exhibitions arriving from abroad." The words "arriving from abroad" certainly modify "proprietors or managers," not "exhibitions." So there is a complete parallel here also. In each instance the instruments of employment must *come with* the person bringing them—in the one instance they must be "in the actual possession at the time of arrival," in the other they must be "brought by" persons "arriving from abroad." We take these two statements to have an identical significance. For as to the first instance (instruments of employment other than theatrical effects) the goods are in the custody of the steamship company, as much as they are in the case of theatrical effects. That custody is construed to be the "actual possession" of the person bringing them and who comes on the same vessel,—*and he must come on the same vessel.*

Rosenfeld v. United States, 66 Fed. 303;

Sandow v. United States, 84 Fed. 146.

It is true that before the *Rosenfeld* case was decided (which was in 1895) the Department, in two

instances and (so far as we have been able to find) in no more, had shown a disposition to apply a more relaxed rule regarding the necessity of the goods coming in the very same vessel and at the same time as the importer. Those were in Treasury Decision 13785, given in 1893 under the law of 1890, and in Treasury Decision 14049, also given in 1893 and under the law of 1890. In the former it was ruled that though the tools did not arrive on the same vessel with their owner, yet since they were in the importer's possession "at the moment of his departure for this country, and were in transit during his voyage" and "he had in his possession at the time of his arrival a bill of lading for said tools of trade—this was legally tantamount to legal possession." In the latter decision it was ruled that theatrical effects imported by Wilson Barrett, an actor and manager, were duty-free, although Mr. Barrett arrived at New York on a fast liner and the goods were shipped by slower vessel direct from Liverpool to Philadelphia where his performances were to begin. This was certainly a great straining of the law; we do not find another instance of such a strained application of it.

But on the other hand stands Treasury Decision 10916, given in 1891, under the law of 1890, in which it was held that law books not brought actually with the importer on his return to this country were not duty free. And the act of 1890 was also involved in the ruling in Treasury Decision 12199 made November 16, 1891. Therein it is said:

“Paragraph 686 restricts free admission to tools of trade ‘in the actual possession at the time of persons arriving in the United States.’ Mr. Kernisch arrived in the steamship *Eider*, while the workbench was imported in the steamship *Polynesia*. The protest is overruled”—and free entry was not allowed.

Then came the decision in the *Rosenfeld* case, 66 Fed. 303, made in 1905, followed by that in *Sandow v. United States*, 84 Fed. 146, and these cases have since been undeviatingly followed by the Department.

In the *Rosenfeld* case, 66 Fed. 303, the facts were that “in July, 1891, the appellant caused to be shipped at Berlin, where he was, for Bremen, with instructions to a broker at Bremen to forward them to this country by the first freight steamer, certain costumes, properties, and scenery belonging to the appellant and his brother, for use by them in theatrical representations to be given in this country. The articles arrived at the port of New York and were entered for duty about the middle of October, 1891. The appellant had meantime taken passage on a steamer which arrived at the port of New York about the middle of July, 1891.” *Rosenfeld* claimed free entry under the “tools of trade” paragraph of the free list, but the board of appraisers levied duty on the goods. *Rosenfeld* appealed and the Circuit Court affirmed their decision. *Rosenfeld* then appealed to the Circuit Court of Appeals. The latter court said, 66 Fed. 304:

“The exact inquiry is whether articles which do not arrive in the United States at the same time or in the same vessel with the person importing them are to be deemed in his ‘actual possession at the time of his arriving,’ within the meaning of the statute. The previous statutes placing professional implements and instruments of trade upon the free list do not throw any light upon the inquiry, because until the statute in question the only limitation was that the articles should ‘belong’ to persons arriving in the United States, and should not be imported for sale or for use in any manufacturing establishment. The words ‘in the actual possession at the time of his arriving’ constitute a new and further limitation. Pursuant to this language, it is not enough that the articles should belong to the person arriving, or be in his possession constructively, but they must be in his actual possession at the time. * * * Literally, and giving the words their ordinary meaning, the ‘actual possession’ of the statute is an open, visible, present occupancy and possession of the articles imported. In order to leave no doubt that this is the meaning, the actual possession and the arrival of the owner must be coincident. We suppose that articles which are brought with the owner, in the same vessel, are to be deemed in his actual possession at the time of arriving, although they are in the immediate custody of the carrier. The carrier is his custodian, and the goods, under such circumstances, would be in the actual possession of the owner, equally as if they were in the custody of his personal servant. If, however,

the articles arrive in a different vessel and at a different time from the owner, it would seem plain that they are within the excepted category.

“These conclusions lead to an affirmance of the judgment.”

And the *Sadow* case, 84 Fed. 146, decided nearly three years later, but arising also under the law of 1890, applied the same construction to the statute. The court said:

“These are horses conceded, in argument, to have been so trained and used in exhibitions as to be implements of occupation of the plaintiff. The ship in which he came would not bring them, and they arrived otherwise a few days after he did. They were not in his possession as of a person at the time ‘arriving within the United States,’ within the requirement of paragraph 686 of the act of 1890, for he was not then arriving, but had arrived some time before.”

These two cases were followed by the Department in:

Treasury Decision 15993;
 Treasury Decision 16481;
 Treasury Decision 22558;
 Treasury Decision 26337.

In Treasury Decision 15993 it is said:

“It appears from the papers in the case that in the early summer of 1894 Mr. Sherman Brown, a theatrical manager and proprietor, gave an order in London for 70 theatrical costumes and properties for certain actresses he

proposed to bring over to this country. Mr. Brown reached New York in the *City of Paris* July 15; his actresses arrived by the *Lucania* July 21, but owing to the delay of the London costumer the theatrical properties shipped by the *Campania* did not reach America until August 18.

“The goods were assessed for duty, but are claimed to be entitled to free admission under paragraph 686, act of October, 1890, as tools of trade or professional implements.

“Paragraph 686 exempts from duty tools of trade, etc., ‘in the actual possession at the time of persons arriving in the United States.’

* * *

“But the United States Circuit Court of Appeals for the Second Circuit (*in re* Rosenfeld) has recently rendered a decision which sharply defines the meaning of the words ‘actual possession,’ as used in paragraph 686.

“The Court says [and here quotes from the Rosenfeld case the statement which we have already quoted from that case].

“The ruling of the Court is plain, and the Board, of course, will follow it.

“The protest is overruled accordingly.”

Where an architect claimed that certain mechanical drawings executed by himself and used in his business as patterns, were exempt from duty under paragraph 645 of the act of July 24, 1897, as “tools of trade,” the General Appraiser, on October 18, 1900, ruled, Treasury Decision 22558—G. A. 4783, that the drawings, so far as their *nature* was concerned, fell within the exempted class named

in that paragraph; but the written statement of the claimant was, in part, as follows:

“That the trunk mentioned herein was shipped from Kohn by me in time to connect with the steamer on which I arrived, but it was delayed on the way and did not reach Hamburg in time, and I was compelled to leave it to be forwarded by following steamer.”

And the ruling was as follows:

“A case within the requirements of ‘actual possession’ laid down in *in re Rosenfeld* (66 Fed. Rep. 303), hereinafter quoted, is not made out. On the contrary this declaration shows the emigrant not in actual possession at the time of his departure.”

* * *

“The actual question, then, is whether articles which *do not* arrive in the United States at the same time or in the same vessel with the person importing them are to be deemed in his ‘actual possession at the time’ (of his arrival), within the meaning of the statute. The words ‘in actual possession at the time’ (of his arrival) constitute a limitation.”

* * *

“As these drawings arrived in a different vessel at a different time from the owner, it is clear that they were not in his *actual possession*—the actual possession and the arrival of the vessel must be coincident.”

In Treasury Decision 26337—G. A. 6029, under date of May 2, 1905, it was ruled that certain things (which were admittedly tools of trade but which arrived at New York from abroad in June, 1904,

whereas their owner had arrived on a prior trip of the same steamer in March, 1904), did not come with the importer; and held further that the word “emigrating” in the law of 1897, used where “arriving” had been used in earlier acts, did not change the proper construction to be placed on the paragraph. The objects and the importer must come on the very same trip of the very same vessel.

Hence for the past twenty-three years there has been a uniform course of decision, both by the Department and by the courts, that in order that theatrical effects, or any other tools of trade, may be entered duty-free (whether absolutely or under bond for exportation), they and the importer must come into this country at the very same time; and this means that where they come by vessel from across the ocean they must come by the very same trip of the very same vessel.

On pages 71-72 of the Transcript appears the following:

“GASTON GARONNE, a witness called and sworn on behalf of the defendant.

Mr. deJOURNAL.—We would like to have Mr. Imhaus act as interpreter.

The COURT.—What is the purpose of this testimony, to corroborate the last witness?

Mr. WEST.—We want to show that he came from Paris on the ship with these goods; we want to show they were not brought here with Mr. Grazi.

The COURT.—*Do you claim that they were?*

Mr. JARED.—*No, we do not.*

The COURT.—*You admit Mr. Grazi did not accompany the goods at all?*

Mr. JARED.—*I have learned since he did not.*”

* * *

“Mr. WEST.—Probably this will be admitted too, that Mr. Grazi was here in San Francisco during the whole of the month of October, 1911, and did not come with these goods from France.

The COURT.—Counsel has already admitted he did not come.”

The goods arrived in this country in the steamer *Caroline* from Havre, France, and were entered at the port of New York on November 4, 1911, the date of the arrival of the vessel at that port (Tr. p. 30).

Under the authority of the rulings which we have reviewed we see no rational escape from the conclusion that, since the proof in this case shows and it is admitted by the government that the goods did not come with Grazi but that he came and was in this country many weeks before they arrived, they were not within the case of duty-free goods, under said paragraph 656. Therefore, the government should have collected duty on them on their arrival, for neither that paragraph nor any other authorized the government to take a bond for the exportation of the goods within a limited period, or, in the alternative, the payment of duty on the goods; or authorized the government to take a bond conditioned, as this one is, for exportation only. Therefore the

bond was wholly unauthorized by law. As a statutory bond it is void.

The Statute Requires That the Goods Shall Be Exported Within a Stated Time or Duties Shall Be Paid on the Goods. A Bond Conditioned, as This One is, for Exportation Alone is Void as a Statutory Bond.

A statutory bond, in order to be valid as such, must contain all of the essentials prescribed by the statute itself. If the statute permits the obligor to discharge himself of liability by doing either of two alternative acts and the condition of the bond mentions only one of them it is void as a statutory bond. If this were not so the obligor might perform the alternative act which was omitted from the bond and the bond would still be enforceable against him, and he would thus be penalized without authority from the statute. A plea of performance would be unavailing as a defense to the bond unless the proof were of performance of the very condition mentioned in the bond; evidence of performance of the unmentioned alternative would be incompetent, irrelevant and immaterial. The only possible way to protect the obligor against what amounts to a double penalty is to hold the bond void.

In the case of a bond given at one port conditioned for the entry of goods at another port of the United States, where the statute made an exception—"dangers of the sea excepted"—and this exception was omitted from the conditions of the bond, the bond was held void. Chief Justice Mar-

shall, sitting as Circuit Justice said in that case,
United States v., 1 Brock. 195, Fed.
 Cas. No. 14,413:

“* * * the legislature have commanded that the exception form a part of the condition of the bond. If such condition do not appear, it is not such a bond as the statute has directed, and has authorized the collector to take. The exception is, in itself, very material, and, therefore, the officer is not at liberty to dispense with it, although it should be true that by skillful pleading, the defect might be cured. The act does not permit him to impose this risk on the obligor. The bond to be good as a statutory bond, ought to contain what the law requires.”

And when it was argued that the conditions which the statute prescribes need not be expressed in the bond, he said:

“The first position to be examined is this: It is contended that the law does not require the words ‘dangers of the seas excepted,’ to be inserted in the bond. The statute itself must decide how far this position is correct. The words are, ‘the master, &c, of such vessel shall first give bond, &c.’ If no more was intended by this position, than to say that the very words in which the obligation should be expressed are not prescribed in the statute, the position would be true in itself, but the court would be at a loss to discern its application to this case. On a statute which prescribes, not the words, but the substance of a bond, the force of that argument is not perceived, which contends, that because the precise form is not given, the sub-

stance which is given may be disregarded. If it was intended to say that the statute does not require the exception in some form to appear in the bond, the correctness of the construction cannot be admitted.”

Where too much, by way of conditions, is inserted in a bond, the excess may be eliminated; but where too little is inserted, the deficiency cannot be supplied by the court, and the bond is void. On this point Chief Justice Marshall said, in said case of *United States v.*:

“In that case [*United States v. Dixon*, Fed. Cas. No. 3,934] as in this, the condition of the bond was in part unauthorized by law, and a condition was omitted, which the law was supposed to require. In its reasoning, the court inclined to the opinion, that the surplusage did not vitiate the bond; but determined that it was vitiated by the omission of a material condition required by law. The reason for determining the two objections differently, is this. The court supposed itself competent to say, on a bond containing everything required by law, and something more, that the surplusage might be considered as an absolute nullity, and the bond construed as if such surplus and void matter was not contained in it. This is not a novel principle. There are many cases in which surplus matter is rejected. By rejecting it in this case, the bond conforms to law, and it is an effort to give validity to the instrument. It is possible, the effort may not be defensible. But where an essential circumstance required by law, is omitted in the bond, the court does

not believe itself competent to supply the omission, and to make the bond conform to the statute. No analogous case is known, in which a court of law exercises such a power. The court may reason erroneously, in supposing itself competent to reject surplus matter, stated in a statutory obligation, which contains every thing required by law, and incompetent to insert in such obligation, matter which it does not contain; or it may apply the principles improperly in the case. But the inconsistency of the two opinions is not perceived. If there be hostility between them, if there be any irreconcilable opposition, between the two positions, that a court may reject surplus matter in an instrument, but cannot aid the want of substance, that hostility, that opposition, is not yet discovered."

9 C. J. 68, §113, says:

"Where the conditions of the bond are in the alternative, unless the election is given to the obligee, the performance of any one of the conditions releases the obligor who may elect which alternative shall be complied with, and a failure to perform one only does not result in a breach if the other may yet be performed."

9 C. J. 74, §127, says:

"An act of the obligee which prevents the obligor from performing one of two alternative conditions is a sufficient excuse for his nonperformance of the other."

It is clear from the statute that the bond must be in the alternative,—it must provide that the importer

will (a) export the goods within the required time, or (b) pay duties on the goods. The Treasury Department could not, if it would, dispense with either of these alternatives. But, to do the Department justice, it does not seem to have thought, except possibly in sporadic cases (of which this is one), that it could repeal or disregard the plain mandate of the statute. For from the customs regulations prescribing the form of the bond and from cases which have found their way into court it is evident that the Department has, in general, recognized that the bond *must be in the alternative*. Thus, in October, 1894, a bond was given by Lillian Russel under the tariff law enacted two months before (the first law, as we have seen, to mention expressly theatrical effects). The form of the condition thereof appears in the report of *United States v. Russell*, 84 Fed. 878, and was as follows:

“Now, therefore, the condition of this obligation is such that if the said Lillian Russell shall well and truly observe and comply with the provisions of said paragraph 596, and export the said theatrical effects without the limits of the United States within six months from this date, *or*, in the event of her failure to export the said effects, pay the proper duties which the collector of customs of New York may assess upon the same, within the time prescribed by law for the collection of duties on imported merchandise, then this obligation to be void; otherwise to remain in full force and virtue.”

And the Customs Regulations of 1908, issued by the Treasury Department, prescribe as follows:

“Article 677. *Articles Embraced.* Theatrical scenery, properties and apparel brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them in such exhibitions and not for any other person nor for sale and which have been used by them abroad shall be admitted free of duty under bonds *conditioned for the payment of duties on such articles as shall not be exported within six months after importation.*”

And in Treasury Decision 29936, promulgated on August 6, 1909, the next day after the tariff law was enacted under which bond in suit was exacted from Grazi and the defendant, the following is found:

“To collectors and other officers of the customs:

“The existing regulations of this Department hereinafter referred to are hereby continued in full force and effect and are extended to importations under the tariff act of August 5, 1909, as follows: * * * Articles 677 and 678, Customs Regulations of 1908: To theatrical effects, under paragraph 656.”

The so-called Catalogue Form No. 3775 prescribed by the Department appears to have been in use many years—was in use long before the bond in suit was given. It has been “amended” after the enactment of each new tariff law, not by any change in the body or conditions of the bond but by inserting the

appropriate new paragraph numbers, in lieu of the old paragraph numbers of the law, in the fine-print directions at the head of the bond. The form of this bond prescribed for use in connection with importation of theatrical effects and such other things as, under other provisions of law, are imported duty-free, subject to exportation, or, in the alternative, payment of duties, is given in Treasury Decision 31999, dated in November, 1911 (this form merely being the form long before used, amended as just stated), and is conditioned as follows:

“Now, therefore, the condition of this obligation is such that if the aforesaid merchandise shall be actually exported within six months after the date of its importation and shall not, or any part thereof, be relanded in any port or place within the limits of the United States, and if the certificates and other proofs required by law and the customs regulations showing the delivery of the same at a foreign port or place shall be produced and deposited with the collector of customs at the said port of importation within one year from the date hereof, *or*, in default thereof, if the obligors shall pay the duties which may be assessed upon the said goods, wares, or merchandise, then this obligation shall be void; otherwise it shall remain in full force and effect.”

It is apparent that the form is an old one for it is further directed in said Treasury Decision:

“A supply of such forms will be furnished upon requisition therefor being made. The

forms of Catalogues 3775 and 3779 *now on hand*, may, however, be used until the supply thereof is exhausted."

Thus there was no warrant either in law or the Customs Regulations, in the prescribed form or in the general practice of the Department, for any such bond as that in this case. As a statutory bond it is void.

There is internal evidence in the bond in suit that it was an antiquated and long-unused form when the collector took it. It appears (Tr. p. 3) to be form 158 instead of form No. 3775, and it is the latter which is spoken of in Treasury Decision 31999 of November, 1911, as having been in use for the purposes for which the complaint in this case represents this bond to have been taken. And the bond-form further recites (Tr. p. 3) that "This bond to be used for all purposes of importation of articles that are to be exported within six months, under Sections 2505, 2511, 2512 and 3021, Revised Statutes." Section 2505, as we have seen hereinbefore, is the old law of 1861 regarding "wearing apparel in actual use, and other personal effects, professional books, implements, instruments, and tools of trade, occupation or employment of persons arriving in the United States," and (not to mention the laws of 1883 and 1890) was superseded by the law of 1894 which is *very materially different* from section 2505 of the Revised Statutes. The form of the bond in suit may have been used for a few years after 1894 but there was no excuse at all for

its use at any time after the law of that year went into effect, for it and all subsequent acts clearly require a bond in the alternative.

The said regulations made by the Secretary of the Treasury have the force and effect of law.

United States v. Ormsbee, 74 Fed. 207, 209;

Gratiot v. United States, 4 How. 80, 117;

United States v. Eliason, 16 Pet. 291, 301-302.

And see:

Field v. Clark, 143 U. S. 649, 680, 693;

Tilley v. Savannah etc. R. Co., 5 Fed. 641, 655-659;

Chicago & N. W. R. Co. v. Dey, 35 Fed. 866, 874-875.

This court takes judicial notice of the rules and regulations promulgated by the Secretary of the Treasury under the authority of and supplementary to the provisions of section 656 of the act of August 5, 1909.

Caha v. United States, 152 U. S. 211, 221-222;

Cosmos etc. Co. v. Gray Eagle Oil Co., 190 U. S. 301, 309.

Where the bond is set out in the complaint, or over thereof is craved and had, the proper way to raise the question of its invalidity for failure to conform to the statutory requirements, is by demurrer.

United States v. Hodson, 10 Wall. 395, 404.

The question was so raised in:

Dixon v. United States, 1 Brock. 177, Fed.
Cas. No. 3,934;

Sullivan v. Alexander, 19 Johns. (N. Y.) 233;

People v. Meighan, 1 Hill (N. Y.) 298.

If the bond is void it is competent for the defendant to raise the objection at any stage of the trial.

United States v. Hodson, 10 Wall. 395, 404.

The lower court (Tr. p. 28) cited and quoted from *United States v. Dieckerhoff*, 202 U. S. 302, 309, as sustaining the proposition that even if a bond is "not strictly in conformity with the statute, if it does not run counter with the statute, and is neither *malum prohibitum* nor *malum in se*, it is a valid bond." That principle is undoubtedly true if it is correctly limited and applied. It was so limited and applied in the *Dieckerhoff* case. In that case there was no question about the *condition* of the bond; the only question was as to the *amount of the penalty* in case the condition was broken. The court held that since the statute permitted the penalty to be twice the value of the whole importation, a bond which named as the amount of the penalty twice the value of only a part of the importation (namely, of the particular package not returned to the collector upon demand) the defendant was in no position to say that the bond was not valid; because the penalty was less, not more, than might have been named in the bond. Said the court, p. 310:

“Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a *package* by paying *its value*, when a bond in *double the value of the merchandise* * * * might have been required.”

Naturally, a bond naming a penalty not as great as the statute would have permitted to be exacted “does not run counter with the statute.” It might even be that a bond naming a greater penalty than the statute authorized would be valid for the amount authorized by the statute. See *State v. Taylor*, 10 S. D. 188, 72 N. W. 409, 66 Am. St. Rep. 711; *Smith v. United States*, 5 Ariz. 64, 45 Pac. 344. But quite different considerations control this case. Here the obligor is bound by the bond to do one certain thing or forfeit the bond, while the statute permits him to do, at his pleasure, either said certain thing or another thing specified. Such a bond clearly does “run counter with the statute.” This case differs from the *Dieckerhoff* case, therefore, in these all-important respects: the bond here imposes a *more onerous condition*, the bond there imposed a *less onerous penalty*, than is mentioned in the statute. Therefore, the bond here is void, while that there was valid.

**The Bond in Suit is Void Because of the Restriction Therein
Against Exportation Through Any Port but San Francisco.**

This bond is conditioned on the exportation of the goods through the port of San Francisco, where the bond was taken (Tr. pp. 3-4). The statute

contains no such restriction. From the forms and precedents which we have hereinbefore considered it is apparent that no such restriction was prescribed or practiced by the Department. If Grazi had ended his season at Savannah, Georgia, or at New Orleans, he must still have shipped the goods back to San Francisco for export, in order to comply with this bond. Such a restriction renders the bond void.

In *Dixon v. United States*, 1 Brock. 177, Fed. Cas. No. 3,934, Chief Justice Marshall said:

“But may the statute be exceeded? It would certainly be mischievous, to allow officers to insert in the bonds they are empowered to require, conditions not warranted by law. Although courts and lawyers may know that such conditions have no effect, obligors may not know it, and this abuse of official power may very materially affect the interest of individuals, who may regulate their conduct on the opinion, that they are bound to the full extent of the instrument they have executed. That, in this particular case, the condition inserted may not be in hostility to the general views of the legislature, cannot materially vary the question, for it is not warranted by the statute; and if the officer be at liberty, under the colour of office, to introduce such conditions as his own judgment may approve, then his judgment, and not the statute, becomes the director of his conduct.”

People v. Meighan, 1 Hill (N. Y.) 298, was on a bastardy bond in which the officer taking it had

inserted a condition not mentioned in the statute, in addition to the statutory condition. The court held the bond wholly void and said, by Cowen, J., p. 299:

“This was a material addition, which might prove much more onerous than the condition required by the section. The latter is generally to indemnify, &c. which may be by providing for the child, under some mutual arrangement, or in some other way. The former leaves but one mode; the payment of the money to be ordered.”

It is true that a statute of New York is mentioned which seems to have rendered void any bond not in the form required by the statute. But we submit that the same result must have been reached even in the absence of such a statute.

In *Sullivan v. Alexander*, 19 Johns. (N. Y.) 233, there was an addition, not authorized by the statute, to the condition of the bond. The bond was taken by a sheriff on suffering a prisoner in execution to go at large within the limits of the liberties of the jail. The addition not authorized by statute was the words “that the prisoner should, at the request of the sheriff, again surrender himself to the prison.” The bond was held void. Spencer, C. J., said *p. 235:

“This is a substantial and material part of the condition. * * * *Beawfage’s* case (10 Co. 100), *Kidwelly v. Brand* (Plowd. 60, 68), and *Rogers v. Reeves* (1 Term Rep. 418), are some of the many cases which show that such a bond is void. A mere verbal difference or departure from the provisions of the statute,

will not render a bond to the sheriff void; but when there is a substantial variance, as if the sheriff adds to the condition that he shall be kept without damage against the king and the plaintiff, that will make the whole condition void. The sheriff, in this case, had no right to require the defendant, Alexander, to surrender himself to prison, at his request. He has a right to reimprison a defendant who has been admitted to the liberties of the gaol, in one case only; that is, when the sureties taken for the prisoner are insufficient; but the condition to this bond does not embrace that case. We are of opinion, therefore, that the defendants are entitled to judgment."

We take the following from the opinion of Mr. Justice Washington in *United States v. Morgan et al.*, 3 Wash. C. C. 10:

"The embargo law, under which this obligation was taken, does not set out, in precise terms, the form of it; but the material parts of it are clearly prescribed. It is to be in a sum of double the value of vessel and cargo, with condition that the goods shall be relanded in some port of the United States, dangers of the sea excepted. If it be taken in a greater sum than the law directs;—if the condition stipulate a relanding elsewhere than in the United States;—if it stipulate a relanding absolutely, when the law requires it to be done on a certain condition;—or if it bind the obligors to do more than the law requires—it is not the bond which the officer was authorized to take, and all is void. A contrary doctrine might be productive of the most intolerable oppression to the citizen,

as well as of detriment to the government. * * *

“Applying the above principles to this case, the bond is void;—first, because the condition is to reland the cargo within the United States, although the obligors might have been prevented from doing so, by a peril of the sea; and secondly, because the condition requires the obligors to return the certificate of relanding to the collector at Philadelphia, within a limited time, whereas the law did not impose upon the obligors the necessity of returning the certificate to that officer at all, much less to do so within any prescribed period.”

Hence, in the bond in the case at bar there are two restrictions upon the obligors, neither of them at all warranted by law, and either of which alone would (independently of the other) render the bond void. The one restriction is that the obligors *must* export, whereas the statute permits them to export *or* pay the duty, at their pleasure. The other restriction is that they must export from the port of San Francisco, whereas the law permits them to export from any port of export of the United States. Speaking of the case of *United States v. Morgan*, Fed. Cas. No. 15,809, Judge Hopkinson, in *United States v. Brown*, Gilp. 155, Fed. Cas. No. 14,663, has the following to say, which is a very good statement of the defects in the bond in suit:

“It is impossible to make the bond in Morgan’s Case conform to the law, by taking away any part of it. You must make altogether a new and a different condition; you must add an important qualification or exception given by

an act of congress, and not given by the bond; and you must essentially change, indeed expunge another part of the condition, which was not warranted by the law. In short, you must make a new contract between the parties."

So here you must make "a new and a different condition"—that the obligor shall pay the duties on the goods; and "you must essentially change, indeed expunge, another part of the condition, which was not warranted by the law"—the condition that the goods be redelivered to the collector of the port at San Francisco for export.

The Bond in Suit is Void as a Common Law Obligation Because as Such it Has No Basis on Which to Rest and is Without Consideration.

Paragraph 656 of the tariff act of 1909 permits free importation of theatrical effects on one condition only, so far as the *form of the bond* is concerned; namely, that the importer shall give a bond in the alternative (to export within a prescribed period *or* to pay the duty). If he does not give that particular character and form of bond the goods are clearly *not* duty-free under that paragraph. That is, if a bond of that character is not given the obligation exists against the importer to pay the duties on the goods.

Therefore, had this bond been conditioned *to pay the duties* on the goods there would have been room for argument that, entirely apart from paragraph 656, it would be a good common law bond because

conditioned for the performance of an obligation or duty resting on the importer—an obligation arising under other provisions of law than said paragraph 656. But the bond in suit is not so conditioned. It is conditioned to export through the port of San Francisco. There was no obligation imposed by any law whatsoever, and no natural obligation arising independently of law, to export said goods through the port of San Francisco, or through any other port, or at all. Therefore, there was no basis for the bond in suit to rest on.

The government, in default of Grazi's giving a bond in the form prescribed by the statute, might have said to him, "Since the bond in the statutory form has not been given by you, the duties are payable and we will not deliver the goods to you unless you either pay the duties in cash or give a bond conditioned for their payment." If he had thereupon given the latter bond, it could, with reason, be argued that such a bond is a good common law bond. But that is not what the government said or did; it is not that kind of bond which it took. It took a bond conditioned for the doing of something which Grazi was under no legal or moral or natural obligation at all to do.

Import duties are taxes. Taxes are not contractual, but the payment thereof is a non-contractual obligation. However, a promise, on due consideration, in form of bond or in other form, to pay taxes *is* contractual. The delivery of imported goods by the government to the importer may be a

consideration for the promise to pay the import tax, to pay which is, as just stated, a non-contractual obligation. But the delivery of imported goods by the government to the importer cannot be a consideration for a promise, in form of bond or otherwise, to export them out of the country, for there is no obligation of any kind or nature to export them. In fact, abstractly, and purely as a matter of policy, the civilized governments of the world, including our own, encourage importation of all goods which possess no noxious feature. Hence, viewed as a common law bond, the bond in suit was wholly without any legal or valid consideration.

As a common law bond it is void.

We respectfully submit that the amended demurrer to the complaint should have been sustained, and that judgment should have been given for the defendant, and that the judgment of the Court below should be reversed.

Respectfully submitted,

F. DEJOURNAL,

T. C. WEST,

ROY V. NYE,

Attorneys for Plaintiff in Error.

No. 3072

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ILLINOIS SURETY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

Upon Writ of Error to the Southern Division of the United
States District Court for the Northern District of
California, Second Division.

JOHN W. PRESTON,
United States Attorney,

ED F. JARED,
Asst. United States Attorney,

Attorneys for Defendant in Error.

Filed this.....day of May, 1918.

FRANK B. MONCKTON, Clerk,

By....., Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ILLINOIS SURETY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

Plaintiff in Error seeks a reversal of the judgment on two grounds:

1. Insufficiency of the complaint, because of alleged fatal defects and omissions in the bond set out in the complaint.

2. That the evidence shows that the theatrical effects covered by the bond in suit did not come into the United States on the same vessel with Grazi, the manager of the opera company, and that said effects were not at the time of arrival in the actual possession of said manager, and that, therefore, the bond was absolutely void.

For the sake of convenience, counsel argue the second contention first, stating it on page seven of the brief as follows:

**Theatrical Effects are Tools of Trade, and Must Come
on the Very Same Vessel and at the Very Same
Time as the Importer.**

It is readily conceded that theatrical effects are "tools of trade, occupation, or employment", but the argument is fallacious and invalid for the reason that it fails to recognize the change in tariff laws beginning with the tariff act of August 27, 1894, paragraph 596, quoted in full on page 9 of the brief of counsel. In this law, for the first time, theatrical effects were specifically enumerated. Prior thereto theatrical effects were allowed to be imported under the same conditions that applied to all other "tools of trade, occupation, or employment", and if imported under those conditions, they were absolutely free; but the act of August 27, 1894, *supra*, in effect, prohibited the free importation of theatrical effects unless brought by proprietors or managers of theatrical exhibitions arriving from abroad for temporary use by them. That act further provided that the free importation of such articles should be under such regulations as the Secretary of the Treasury should prescribe and that bonds should be given for the payment to the United States of such duties as might be imposed by law upon any and all such articles as should not be exported within six months after the importation, and empowered the Secretary of the Treasury to extend the six months period for a further term of six months in case application should be made therefor.

The theatrical effects covered by the bond in question were imported under paragraph 656 of the tariff act of August 5, 1909, 36 Stat. at Large, page 78, and which contains the same provision as to theatrical effects as paragraph 596 of the act of August 27, 1894, but which differs therefrom as to other "tools of trade, occupation, or employment", in that the importers of such other "tools of trade, occupation, or employment" must be persons *emigrating* to the United States, a limitation which is absent from the act of August 27, 1894.

It is very clear that the law does not contemplate that *theatrical effects* should be "in the actual possession at the time of arrival of persons emigrating to the United States", for the reason that paragraph 656 prohibits free importation of such articles unless brought by proprietors or managers of theatrical exhibitions arriving from abroad for *temporary use* by them in such exhibitions and a proprietor or manager of a theatrical exhibition coming into the United States for temporary purposes only, is not an immigrant into the United States nor an emigrant from any other country.

Newton v. United States, 6 U. S. Court of Customs Appeals Reports, 503. The reasoning of counsel on page 14 is entirely correct as applied to "tools, implements, and instruments of trade, occupation, or employment", brought into the United States by an immigrant, that is, a person who has emigrated from

a foreign country to the United States, one of various reasons being that the owner has come into the United States for permanent residence. This reasoning and the law do not permit an individual member of a theatrical troupe to bring his costumes or other theatrical effects free of duty into the United States. The statute is so clear on this point that authority is unnecessary; but this construction was given in Treasury Decision 21973, February 3, 1900, where theatrical apparel imported by a member of a French Opera Company and not brought by the manager or proprietor thereof, was denied free entry.

One provision of the law relative to the importation of theatrical effects is that their importation shall be under such regulations as the Secretary of the Treasury may prescribe. In this case the regulations prescribed by the Secretary of the Treasury governing the importation are found in Articles 677 and 678 of the Customs Regulations of 1908. The general heading "Theatrical Effects" precedes Article 677. The theatrical effects embraced within the regulations must be brought by proprietors or managers of theatrical exhibitions arriving from abroad; they must be for temporary use by the proprietors or managers in such exhibitions; they must not be for any other person; they must not be for sale; they must have been used by said proprietors or managers abroad; and bond, conditioned on the payment of duties on such articles not exported within six

months after importation must be given. There is not the least inference that the goods must be in the actual possession of the proprietors or managers at the time of arrival. In this connection and in reply to counsel's argumentative question on page 14 of the brief, it is to be observed that the togas, swords and shields of Brutus, Cassius and Caesar are not entitled to free entry unless brought in by a proprietor or manager of a theatrical exhibition. Even the patriotic dagger of the "noblest Roman of them all" would be subject to duty if brought in otherwise than by a proprietor or manager of a theatrical exhibition for exhibition purposes and for temporary use. The decisions of the Board of General Appraisers and of the courts relied upon by counsel on this branch of the case concern importations prior to the tariff act of August 27, 1894.

THE BOND IS A VALID OBLIGATION.

Counsel contend that the bond is void, saying in that behalf:

1. That it does not contain an alternative condition to pay duty in lieu of the expressed condition for exportation. (Brief, page 27).
2. That it contains a restriction against exportation through any port but San Francisco. (Brief, page 37).
3. That as a common law obligation it has no

basis on which to rest and is without consideration. (Brief, page 42).

The bond is set out in full in the complaint on pages 3, 4 and 5 of the transcript. The original, on Catalogue Number 747, and printed in book form, is defendant's exhibit "A". The name of the corporate surety, Illinois Surety Company, was signed by Charles T. Hughes, its attorney in fact. The caption of the bond is BOND FOR REDELIVERY. The Number 158 on the upper right hand corner is the number of the bond and not the form number, as suggested by counsel on page 34. The penal sum of the bond is Six Thousand Dollars, to wit, double the estimated duty. The numbers 3000.00 and 6000.00 on the upper left hand part of the bond, are expressive, respectively, of the estimated duty and the double thereof. Mr. Charles T. Hughes testified (transcript, page 60):

"My understanding of what the figures \$3000.00 and \$6000.00, in the upper left-hand corner of this bond are, is that the \$3000.00 is the duty upon the valuation of the goods and the \$6000.00 is double the duty, being the penalty of the bond."

He also testified (transcript, page 58):

"This redelivery bond shows in my own writing the signature of the Illinois Surety Company."

He also testified (transcript, page 57):

“I am familiar with bonding in these matters. I have had about twenty years’ experience.”

On the face of the bond is endorsed the written consent of the surety to six months’ extension.

It thus appears that it was thoroughly well understood by the Illinois Surety Company that the bond was given in pursuance of paragraph 656 of the Act of August 5, 1909, for the purpose of obtaining the admission free of duty for temporary use of the theatrical effects mentioned in the bond and that the bond was given for the payment to the United States of such duties (not to exceed \$6000.00) on such articles as should not be exported within six months after importation. The alternative condition which counsel say is absent from the bond is really expressed in the first part of the bond wherein the principal and the surety are bound unto the United States of America in the sum of \$6000.00, and the condition to export is the alternative, as expressed in the bond.

The estimate of duty was ridiculously poor for the evidence shows that the proper duty was \$9,726.16 (transcript, page 31). It was stipulated (transcript, page 32) that a certain amount of the merchandise was exported, of the value of \$5,852.00, upon which the duty was \$3,617.34. This exportation was a performance pro tanto of the conditions to export, and operated as a duty credit of \$3,617.34 against the total duty of \$9,726.16, and left a balance of \$6,108.82 due as duty on the goods not exported, or \$108.82 in

excess of the amount nominated in the bond, to wit, \$6,000.00, and therefore judgment was given for only \$6,000.00

The claim that the bond contains a restriction againts exportation through any port but San Francisco is utterly groundless. It does contain the condition to redeliver the goods to the Collector of San Francisco for export and the final condition that the principal "shall enter the said effects for exportation from the United States within six months in the manner prescribed by law and the Regulations of the Treasury Department." This means that the goods must be redelivered to the Collector at the port of importation in order that they may be examined and identified as being the goods that were imported and covered by the bond but the condition to export is general, that is, the goods may be exported "from the United States" at any port or ports.

Counsel suggest (brief, page 33) that the form of bond that should have been used was prescribed by Treasury Decision 31999. In this respect it is to be noticed that this Treasury Decision was dated November 11, 1911, the date on which the bond was executed, and therefore of course the regulations therein promulgated could not have reached San Francisco from Washington in time to be used in this transaction. The Treasury Decision cited contains a great many provisions in addition to the new form of bond. Paragraph 7, page 504, Volume 21.

in referring to the various classes of merchandise, provides that merchandise so entered may be exported either at the port of entry or at any other port, except railroad iron for repair or remanufacture and machinery for repair, which must be exported at the same port at which imported, and that before exportation is made, the importer should file an application for the examination of the merchandise for exportation, stating where and when the merchandise may be examined for identification. These regulations promulgated in Treasury Decision 31999 were amended or modified by a new set of regulations in Treasury Decision 33806 and a slightly different form of so-called "Special Six Months' Bond for Exportation" was prescribed (page 285, Vol. 25). On page 287, Volume 25, is a regulation superseding paragraph 7 of Treasury Decision 31999, namely, paragraph 10, which provides that merchandise (this includes theatrical scenery, property and apparel mentioned in paragraph 6 on page 286) so entered, may be exported either at the port of entry or at another port and shall be delivered by the importer for examination, either at the appraiser's store or at such other place as the Collector may designate. It also requires that an application, substantially in a form prescribed, shall be filed with the Collector in sufficient time in advance of the departure of the exporting conveyance to permit examination of the merchandise. The application recites, among other

things, that the merchandise will be delivered for identification either at the appraiser's store or at such other place as the Collector may designate.

The regulations of the Treasury Department, contained in Treasury Decision 31999 and Treasury Decision 33806 are referred to here for the purpose of showing that the provision in the bond in suit for redelivery to the Collector of San Francisco, the port of importation, is legal, and because of the purpose of paragraph 656 of the Act of August 5, 1909, was entirely proper and necessary. If the Treasury Department had the power to make these regulations requiring redelivery of the merchandise to the Collector, it had the power to insert such requirement in the bond. (Cat. No. 747). Certainly no one will contend that this provision of the tariff should be administered by the officers of the Government so as to permit a manager of a theatrical exhibition to satisfy the condition in the bond to export, unless the articles sought to be exported were identified by the officers at the port of importation as being the articles that were imported and covered by the bond.

Treasury Decision 29939 promulgated August 6, 1909, the next day after the tariff law was enacted, consists of instructions for guidance of officers of the customs, extending the then existing regulations prescribed under the tariff act of July 24, 1897 and other acts to importations under the Act of August 5, 1909, and is pertinent here, in that on page 63 of

Volume 18, Articles 677 and 678 Customs Regulations of 1908, are extended to theatrical effects under paragraph 656. This had the effect to continue the use of the form of bond (Cat. No. 747) used in this case. In favor of its validity there is the presumption that a public official has performed his duty. Therefore, the form was used by the Collector of Customs under instructions from the Secretary of the Treasury, who was empowered by paragraph 656 to make regulations. If the provision in the bond for redelivery is beyond the scope of the statute the worst that can be said of it is that it is surplusage and not binding, but it can not render invalid those stipulations that are in consonance with the statute.

United States v. Dicerhoff, 202 U. S. 302.

Lowe vs. City of Guthrie, 44 Pac. Rep. 198.

As the bond is a statutory bond any defects therein are cured by reading into it the provisions of the Statute (paragraph 656 Act of Aug. 5, 1909), for the protection of the public.

Brandt Suretyship and Guaranty

Third Edition, section 105.

The technical objection to the form of the bond is not well founded but if it were it would not save this corporate compensated surety from the judgment. A compensated surety unlike the private or friendly surety can not invoke the principle, *strictissimi juris*. Spencer on Suretyship, Sec. 93.

Counsel for plaintiff in error in his statement of

the case (Tr. pp. 2-3) says "the bond in question was not for the payment of duties or for the exportation of the goods but simply for their exportation", and further states that neither on the trial nor in the judgment or opinion of the Court below was the case treated as being for duties, but simply an action on the bond. The facts and law are both in contradiction of the above statements.

The complaint (Tr. pp. 2-3) alleges the section of the Act under which the bond is to be executed. In pursuance of the said section of the act the bond was executed, and is fully set out in the complaint. If it is defective in form because it did not recite that the obligor shall pay to the United States such duties as may be imposed by law upon any and all such articles as shall not be exported, it was cured by the act itself.

The pleadings, the evidence in the case, and the opinion of the court clearly show that the defendant in error was seeking to recover the unpaid duty on the effects not exported as damages for the breach of contract. The judgment of the lower court was in accordance with this view, and no doubt from the opinion of the court the full amount as prayed for in the complaint would have been given, if the amount had not been limited by the contract.

THE BOND IS A VALID COMMON LAW OBLIGATION.

If perchance plaintiff in error can escape liability under the statutory bond, it becomes immovably impaled upon the other horn of the dilemma and is liable upon the bond as a voluntary or common law obligation. If counsel's narrow reading of the bond is to be accepted, it contains a condition to export the merchandise described therein within six months with the obligation upon the surety to pay the United States of America \$6,000.00 for breach of the condition. The consideration for the bond was the delivery of the merchandise to the principal without payment of duty thereon, the said duty being \$9,726.16. (Testimony of C. L. Marple, transcript, page 31).

It is well settled that a bond not prescribed by law but voluntarily given to the United States is a valid obligation.

United States vs. Fausto Mora, U. S. 97, p. 413,

United States vs. Hodson, 77 U. S. 937,

Jessup vs. United States, 106 U. S. 147,

Illinois Surety Co. vs. United States, 229 Fed. Rep. 527,

Moses vs. United States, 166 U. S. 571.

As a voluntary bond, the recovery thereon should be for the full amount regardless of actual loss sustained as a result of the breach because it is a bond running to the Government.

Illinois Surety Company, supra, at page 531.

In this case it does not make any difference which of the two rules of damages is applied because recovery is limited to the sum of \$6,000.00 in either event.

It is respectfully submitted that the judgment should be affirmed.

JOHN W. PRESTON,

United States Attorney,

ED F. JARED,

Asst. United States Attorney,

Attorneys for Defendant in Error.

No. 3073

United States
Circuit Court of Appeals
For the Ninth Circuit.

Apostles on Appeals.
(IN TWO VOLUMES.)

CHARLES P. DOE, Claimant of the Steamship
"GEORGE W. ELDER," Her Engines, etc.,
Appellant,

vs.

COLUMBIA CONTRACT COMPANY, a Corpora-
tion, and UNITED STATES FIDELITY
and GUARANTY COMPANY, Stipulators,
Appellees.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the
District of Oregon.

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The Steamship "GEORGE W. ELDER," Her
Machinery, Tackle, Apparel and Furniture.

COLUMBIA CONTRACT COMPANY,

Libellant and Appellee.

CHARLES P. DOE,

Claimant and Appellant.

Names and Addresses of the Attorneys of Record.

C. W. FULTON, *Fulton*, Yeon Building, Portland,
Oregon;

G. C. FULTON, Astoria, Oregon;

DENMAN & ARNOLD, Merchants Exchange Build-
ing, San Francisco, California, and

SANDERSON REED, Platt Building, Portland,
Oregon,

For the Appellant.

WOOD, MONTAGUE, HUNT & COOKINGHAM,
Yeon Building, Portland, Oregon,

McCUTCHEN, OLNEY & WILLARD and

IRA A. CAMPBELL, Merchants Exchange Build-
ing, San Francisco, California,

For the Appellee.

*In the District Court of the United States for the
District of Oregon.*

The Steamship "GEORGE W. ELDER," Her
Machinery, Tackle, Apparel and Furniture.

COLUMBIA CONTRACT COMPANY,

Libellant.

CHARLES P. DOE,

Claimant.

**Statement of Clerk Under Section 1 of Admiralty
Rule 4.**

BE IT REMEMBERED that on the 31st day of August, 1909, there was duly filed in the District Court of the United States for the District of Oregon a libel by the Columbia Contract Company as libelant against the steamship "George W. Elder," her machinery, tackle, apparel and furniture and that on said 31st day of August, 1909, said libelant filed in said court a stipulation for costs in the sum of \$250.00 with H. B. Dickson as surety thereon. Thereupon a warrant of arrest and monition was duly issued out of said court, and on said date the United States Marshal for the District of Oregon duly arrested the said steamship "George W. Elder."

That on said 31st day of August, 1909, there was filed in said court a claim of owner by Charles P. Doe, claiming to be the sole and *bona fide* owner of said steamship, and that no other person is the owner thereof. And on said date said claimant filed in said cause a stipulation for costs in the sum of \$250.00, with Harry Young as surety thereon. On September 1, 1909, said claimant delivered to the United States Marshal a stipulation to abide by [1*] and pay the decree in the sum of \$25,000.00, with the United States Fidelity and Guaranty Company of Maryland as surety thereon, which stipulation was duly approved by the Honorable Robert S. Bean, District Judge, and was duly filed in said court on said date, and thereupon the said United States

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Marshal delivered the said steamship to the said claimant.

On October 1, 1909, said claimant duly filed in said cause his answer. Thereafter on the 5th day of February, 1912, the said cause came on for trial upon the question of liability before the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon, the libelant appearing by Mr. C. E. S. Wood and Mr. Ira Campbell, its proctors, and the claimant appearing by Mr. William Denman, his proctor, and said trial was continued to and testimony therein taken on the 6th, 7th and 8th days of February, 1912; and thereupon said cause was continued for argument to a date to be thereafter set.

Thereafter on the 3d day of February, 1913, the court entered a finding and decree that the steamship "George W. Elder" was at fault and responsible to the libelant for whatsoever damage the libelant had sustained, the amount of said damage to be thereafter ascertained; and on said 3d day of February, 1913, there was filed in said court an opinion by the Honorable Charles E. Wolverton, District Judge.

Thereafter on the 28th day of February, 1913, said libelant filed in said cause its cost bill and [2] costs thereon were taxed at the sum of \$133.68 in favor of said libelant and against the said claimant.

Thereafter on the 1st day of April, 1916, by order of Honorable Charles E. Wolverton, District Judge, Mr. A. M. Cannon was appointed Special Master to take the testimony upon the question of the amount of damages. Thereafter on the 5th day of October,

1916, said Special Master filed in said cause his findings and report as to the amount of damages in which he found that libelant was entitled to recover from the respondent the sum of \$41,839.83 damages and demurrage together with interest thereon at the rate of six per cent per annum from the 1st day of May, 1910, the date of the completion of repairs, until paid.

Thereafter on the 11th day of December, 1916, upon motion duly filed by said libelant on December 5, 1916, an order was made confirming the said report of the Special Master, and a further order allowing the libelant to amend its libel to conform to the amount of damages found by the Referee, a copy of which order is included in the Apostles hereto annexed.

Thereafter on the 28th day of December, 1916, said libelant filed in said cause an amended libel, and thereafter on the 28th day of December, 1916, there was entered in said cause the final decree giving the said libelant judgment for the sum of \$25,000.00 against the said Charles P. Doe, claimant, and the United States Fidelity and Guaranty Company, stipulator upon the [3] stipulation of said claimant to abide by and pay the decree, and further giving said libelant judgment against the said Charles P. Doe, claimant, for interest at the rate of 6% per annum upon the said sum of \$25,000.00 from the 1st day of May, 1910, until the date of this decree, to wit: \$9,991.65; and further giving judgment in favor of the said libelant in the sum of \$250.00, being a portion of libelant's costs and disbursements,

against said Charles P. Doe, claimant and Harry Young, surety upon the said claimant's stipulation for costs; and further giving said libelant judgment against the said claimant Charles P. Doe in the sum of \$325.63, being the balance of libelant's costs and disbursements. And it was further decreed that this decree bear interest from its date at the rate of 6% per annum.

Afterwards on June 21, 1917, said libelant filed in said cause its cost bill and costs thereon were taxed in the sum of \$441.95 in favor of the said libelant. Thereafter on the 21st day of June, 1917, said claimant filed in said cause a notice of appeal, and by order of said Court duly entered on June 21, 1917, the amount of the supersedeas bond to be given on appeal by said claimant was fixed in the sum of

G. H. M. \$40,000.00.

~~\$36,000.00.~~ Thereafter on August 9, 1917, said claimant filed in said cause a bond on appeal, with the Fidelity and Deposit Company of Maryland as surety thereon, by which the claimant and surtey acknowledge themselves bound in the sum of \$250.00 to answer for any costs which may be awarded against them and in the sum of \$40,000.00 to abide by and pay any decree of damages which may be awarded against them.

Thereafter on the 12th day of October, 1917, said claimant filed in said cause an assignment of errors.

[4]

By an order dated August 16, 1917, duly signed by the Honorable Charles E. Wolverton, District Judge, the time within which said claimant is required to file

the Apostles on Appeal and docket the same in the United States Circuit Court of Appeals for the Ninth Circuit was extended to and including November 1, 1917.

Afterwards, on October 12, 1917, by an order duly entered therein, the clerk was directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit, with the Apostles on Appeal in this case, all of the original exhibits.

G. H. MARSH,
Clerk. [5]

*In the District Court of the United States for the
District of Oregon.*

July Term, 1909.

BE IT REMEMBERED, That on the 31st day of August, 1909, there was duly filed in the District Court of the United States for the District of Oregon, a Libel, in words and figures as follows, to wit: [6]

*In the District Court of the United States for the
District of Oregon.*

The Steamship "GEORGE W. ELDER," Her Machinery, Tackle, Apparel, and Furniture.
COLUMBIA CONTRACT CO.,

Libellant.

Libel.

To the Honorable Judges of the District Court of the
United States for the District of Oregon:
Columbia Contract Co., a corporation organized

and existing under and by virtue of the laws of the State of Oregon, presents this its libel against the steamship "George W. Elder," her machinery, tackle, apparel, and furniture, whereof G. M. Jessen is or lately was master and C. P. Doe and J. H. Peterson are or lately were owners, and against all persons intervening for their interests in said vessel in a cause of collision, civil and maritime, and there-upon your orator articulately propounds and alleges as follows:

I.

At all of the times in this libel set forth libelant was and is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and at all of such times was and still is the owner of a certain screw steamship known as the "Daniel Kern," which vessel was, prior to the 18th day of August, 1909, employed by libelant in the towage of barges to and from Ft. Stevens, Oregon, and points upon the Columbia River above Ft. Stevens.

II.

The "George W. Elder" is a screw steam vessel flying the American flag and plying regularly between Portland, [7] Oregon, and Eureka, San Francisco and San Pedro, California. Her master is or lately was G. M. Jessen, and C. P. Doe, and J. H. Peterson are or lately were her owners and said vessel is now lying in the port of Portland, Oregon, within the District of Oregon, and is within and subject to the jurisdiction of this Honorable Court.

III.

Heretofore and about one o'clock in the morning of

August 18, 1909, the "Daniel Kern" was a vessel under way in the waters of the Columbia River about abreast of Waterford, Washington, and was engaged in making fast to three loaded rock barges, also belonging to libelant, preparatory to towing them from such point to Ft. Stevens, Oregon. Said vessel was in good order and condition and was well and sufficiently manned and equipped with a full and competent set of officers and crew, and said vessel had burning and was displaying the regulation lights, to wit, her port sidelight colored red, her starboard sidelight colored green, both fitted with regulation screen and burning in the proper place; her masthead light and lights also upon her foremast indicating that she had a tow, and a white light astern burning in the accustomed place. The "Daniel Kern" engines were stopped at the time and she was making fast to her tow having a head-line running at the time to the barge forming the port barge of her tow. The "Daniel Kern" was headed down the Columbia River and the barges were headed substantially at right angles to her upon her port bow and towards the Oregon shore of the Columbia River. The "George W. Elder" left Portland, Oregon, upon her regular voyage from Portland to California ports as aforesaid the evening of August 17, 1909, and when descending the Columbia River upon such voyage and in the vicinity of Waterford Light sighted the "Daniel Kern" ahead of herself and down the [8] Columbia River. Neither of the sidelights of "Daniel Kern" were visible to those in charge of the navigation of the "Elder" and the "Daniel Kern" was in

such position as that her sidelights could not be so visible. The "George W. Elder" blew one short blast of her steam whistle as a signal of her desire to overtake and pass the "Daniel Kern" on the right or starboard hand of the "Daniel Kern." To such blast of the "George W. Elder" the "Daniel Kern" replied with four short and rapid blasts of her own steam whistle, the danger signal, indicating that the "Daniel Kern," by reason of the fact that she did not have her tow under control, did not think it safe for the "George W. Elder," the vessel astern, to attempt to pass at that point. To the four short and rapid blasts of the steam whistle of the "Daniel Kern," the "George W. Elder" again blew one short blast, to which the "Daniel Kern" again replied with four short and rapid blasts of her own steam whistle, and almost immediately thereafter the "George W. Elder" came into collision with the "Daniel Kern," striking her upon the starboard quarter aft and inflicting such damage upon the "Daniel Kern" as that within twenty minutes thereafter she sank in the waters of the Columbia River and now lies upon the bottom of the Columbia River.

IV.

The libelant avers that said collision was occasioned solely through negligence and carelessness of those in charge of the navigation of the "George W. Elder," in that she did not keep out of the way of the "Daniel Kern" and attempted to pass the "Daniel Kern" from astern without receiving the assent of the "Daniel Kern" indicated by the appropriate whistle so to do and attempted so to pass when the

“Daniel Kern” had blown four short and rapid blasts of her steam whistle, indicating that it was not safe for the “George W. Elder” to [9] attempt to pass at that point; and libelant further avers that no act of the “Daniel Kern,” her master, pilot, officers or crew in any respect whatever contributed to said collision.

V.

By reason of said collision so occasioned by the negligence and carelessness of those in charge of the “George W. Elder,” libelant, as owner of the “Daniel Kern,” has sustained damages in and about the raising and repairs of said vessel, and loss of equipment upon said vessel, and loss of the use of said vessel, in an amount not at present ascertainable with particularity. Libelant believes that said losses will aggregate or may aggregate the sum of twenty-five thousand dollars (\$25,000) and for said losses and in the sum of twenty-five thousand dollars (\$25,000) it has and claims a lien upon the “George W. Elder,” and also claims against her owners personally.

VI.

All and singular the above premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against said steamer “George W. Elder,” and that all persons having or claiming any interest in said vessel may be cited to appear and answer, but not under oath, the matters and things in

this libel contained, and that upon the final hearing this Honorable Court may pronounce in favor of libelant's said demand with costs against said vessel and her owners, and that said vessel may be condemned and sold to pay the same, and for such further relief as is proper in the premises.

WILLIAMS, WOOD & LINTHICUM,

Proctors for Libelant. [10]

United States of America,

State and District of Oregon,—ss.

I, Daniel Kern, first being duly sworn, on oath say I am the president of the libelant above named, and the foregoing libel is true as I verily believe.

DANIEL KERN.

Subscribed and sworn to before me this 31st day of August, 1909.

[Seal]

J. C. FLANDERS,

Notary Public for Oregon.

Filed August 31, 1909. A. M. Cannon, Clerk.
[11]

And afterwards, to wit, on the 1st day of October, 1909, there was duly filed in said court an Answer in words and figures as follows, to wit: [12]

*In the District Court of the United States for the
District of Oregon.*

COLUMBIA CONTRACT CO.,

Libellant,

vs.

The Steamship "GEORGE W. ELDER," Her Ma-
chinery, Tackle, Apparel and Furniture,
Respondent.

Answer.

To the Honorable Judges of the District Court of
the United States, for the District of Oregon:

Charles P. Doe, claimant for the ship "George W. Elder," her tackle, apparel, furniture and machinery, intervening for his interest therein, for answer to the libel and complaint of Columbia Contract Co., against the said ship, her tackle, etc., admits, denies and alleges as follows:

I.

This claimant is informed that it is a fact and he therefore admits that libellant was and is a corporation, as alleged in the libel, but this claimant does not know and has not been informed save by said libel whether or not the said libellant is the owner of that certain screw steamship known as the "Daniel Kern," or ever was at any time the owner thereof or of any interest therein, and therefore denies the same. Claimant is informed that it is true and he therefore admits it to be a fact that on and prior to the 18th day of August, 1909, the said steamship "Daniel Kern" was employed by the libellant in the

towage of barges to and from Ft. Stevens, Oregon, and points upon the Columbia River above Ft. Stevens. [13]

II.

This claimant denies that the "George W. Elder" is a screw steam vessel flying the American flag and plying regularly between Portland, Oregon, and Eureka, San Francisco and San Pedro, California, and that G. M. Jessen is and was during all the time in the libel mentioned her master, and that this claimant is the owner and was the owner of said steamship "George W. Elder" during all the time in the libel mentioned, but this claimant denies that J. H. Peterson was during said time or is the owner of said vessel or of any part thereof or interest therein. This claimant admits that the said steamship "George W. Elder" was, at the time of filing said libel, lying in the port of Portland and within the District of Oregon, and was and is within and subject to the jurisdiction of this court.

III.

This claimant is informed that it is true and he admits it to be a fact that between the hours of twelve and one o'clock in the morning of August 18th, 1909, the "Daniel Kern" was a vessel under way in the waters of the Columbia River about abreast of Waterford, Washington, but denies that she was then or there engaged in making fast to the three loaded rock barges mentioned in the libel or to any barges whatever, but, on the contrary, this claimant avers that she had at the time in the libel mentioned made fast to said barges. Claimant is informed that it is

true and he therefore admits that the said rock barges mentioned in the libel then and there belonged to the libelant, and that the said "Daniel Kern" had made fast thereto for the purpose of taking the same from said point to Ft. Stevens, Oregon. This claimant denies that said vessel, the said "Daniel Kern," was in good order or condition, but this claimant does not know and has not been informed save by said libel whether or not said "Daniel Kern" was well or [14] sufficiently manned or equipped with a full or competent staff of officers or crew, and he therefore denies the same and the whole thereof. And this claimant denies that said vessel, the said "Daniel Kern," had burning or displayed the regulation lights at said time or at any time in the libel mentioned. This claimant does not know and has not been informed save and except by said libel whether or not said "Daniel Kern" then or there, or at any time in the libel mentioned, had burning or was displaying a port sidelight colored red or any port sidelight, but this claimant is informed that it is true, and he therefore admits, that said steamer did have burning and was displaying her starboard sidelight colored green, but whether or not both or either of said sidelights were or was fitted with the regulation or any screen or were or was burning in the proper place or places, he does not know and has not been informed save and except by said libel, and he therefore denies the same and the whole thereof. This claimant admits that said "Kern" then and there had burning and was displaying her masthead light and a white light upon her foremast, but he does not

know and is not informed save by said libel whether or not she had burning or was displaying a white light astern, and he therefore denies the same. This claimant denies that the said "Daniel Kern's" engines were stopped at the time mentioned in the libel or at any time mentioned in the libel or at the time she was making fast to her tow, but this claimant admits that she had a head-line at the time running to the barges from the port barge of her tow, and this claimant avers that the said "Kern" was then and there made fast to said port barge, and this claimant is informed and believes, and he therefore alleges the fact to be, that the said "Kern" was then and there made fast to the [15] starboard barge and that her bow was against the middle barge of the tow and between the port and starboard barges of said tow. This claimant denies that the said "Daniel Kern" was headed down the Columbia River, and denies that the said barges were or that any of them was headed substantially or at all at right angles to her port bow or towards the Oregon shore of the Columbia River. On the contrary, this claimant avers that the said "Kern" and all of the said barges were headed towards the Washington shore of the Columbia River and obliquely across the channel of said Columbia River.

This claimant admits that said steamship "George W. Elder" left Portland, Oregon, on her voyage from that port to California ports, on the evening of August 17, 1909, and while descending the Columbia River upon such voyage and in the vicinity of Waterford, Washington, sighted the said "Daniel Kern"

ahead and down the Columbia River. This claimant denies that neither of the sidelights of the said "Daniel Kern" was visible at that time to those in charge of the navigation of the "Elder," but avers that the starboard light, being the green light on said side of the "Daniel Kern," was then and there visible to those in charge of the navigation of the "Elder," and this claimant denies that the said "Daniel Kern" was then or there or at any time after the "Elder" sighted her, in such position that her, the said "Daniel Kern's," starboard sidelights could not be or were not visible. This claimant admits that the "George W. Elder" blew one short blast of her steam whistle, and claimant avers that she blew such blast when between one-half and three-quarters of a mile distant from and above the said "Daniel Kern," in said Columbia River, and denies that the said "Elder" blew such blast as a signal of her desire to overtake and pass the "Daniel Kern" on the right or starboard hand of the said "Daniel Kern," but, on the contrary, this claimant avers that when the "Elder" [16] came within sight of the "Daniel Kern" as aforesaid, the starboard light of the latter was in plain view of those in charge of the "Elder," and the said "Kern" and her tow were at least one thousand feet from the Washington shore, the whole distance being deep water and of more than sufficient depth for the "Elder" to safely navigate the same, and the "Elder" blew the said one short blast as aforesaid for the purpose of indicating and did thereby indicate to the said "Daniel Kern" that she, the said "Elder," intended to pass to the right of

the said "Daniel Kern" and between her and the said Washington shore. This claimant denies that to the said signal or single short blast of the whistle of the "Elder," the said "Daniel Kern" replied with four short rapid blasts of her whistle or by giving what is known as the danger signal or replied or gave any blast of her steam whistle whatever, or in any wise or in any manner whatever answered the said signal of the "Elder," and denies that the said "Kern" gave four short or rapid blasts or any short or rapid blast or blasts or any blasts whatever of her steam whistle, or gave the danger signal or any signal whatever, or gave any whistle or signal indicating that the said "Daniel Kern," by reason of the fact that she did not have her tow under control or otherwise or at all, did not think it safe for the "George W. Elder" to attempt to pass at that point, and denies that the said "Daniel Kern" gave any signal or response whatever to the said one blast or signal of the "Elder." Claimant denies that to the alleged four short and rapid or four short or rapid blasts of the steam whistle of the said "Kern," the said "Elder" again blew one short blast, but claimant admits that the "Elder" did again blow one short blast of her steam whistle, but denies that she did so in response to the alleged four short and rapid blasts or any short or any blasts or blast of the whistle or any signal whatever of the said "Daniel Kern," [17] and denies that the said "Daniel Kern" again or at all replied with four short and rapid or short or rapid blasts of her own steam whistle, but, on the contrary, avers that the said "Daniel Kern" re-

sponded to the second single blast of the steam whistle of the "Elder" by giving two blasts of her own, the "Kern's," steam whistle, followed quickly by two more blasts thereof, and claimant denies that almost immediately thereafter, or at all, the "George W. Elder" came into collision with the "Daniel Kern," although claimant admits that shortly thereafter the said "Elder" and the said "Kern" came into collision, the "Elder" striking the "Kern" upon her starboard quarter, but denies that the "Elder" struck the "Daniel Kern" in her starboard quarter aft. This claimant admits that by reason of such collision the hull of the "Daniel Kern" was so injured that she shortly thereafter sank in the waters of the Columbia River.

IV.

This claimant denies that said collision was occasioned solely or at all by reason of or through the negligence or carelessness or any negligence or carelessness whatsoever of those or of any person or persons in charge of the navigation of the said "George W. Elder," and denies that the said "George W. Elder" did not keep out of the way of the said "Daniel Kern" or attempted to pass the said "Daniel Kern" from astern, or attempted to pass the said "Daniel Kern" from astern without receiving the assent of the said "Daniel Kern" indicated by the appropriate or any whistle, or at all attempted to pass the said "Kern" either astern or otherwise, and denies that the said "George W. Elder" attempted so to do or attempted to pass the said "Daniel Kern" either astern or otherwise or at all when

or after the said "Kern" had blown four short and rapid blasts or any blast or blasts of her steam whistle or by any means or signal indicating that it was not safe for the said "George W. Elder" to attempt to [18] pass at that point, or otherwise or at all attempted to pass her; and this claimant denies that no act of the "Daniel Kern" or of her master or pilot or officers or crew in any respect whatever contributed to said collision, but, on the contrary, this claimant avers that the said collision was wholly the result of and was solely due to the negligence and want of care and the wrongful acts on the part of those in charge of the said "Daniel Kern," as hereinafter more particularly alleged and set forth.

And this claimant, further answering, avers that on the night of the 17th day of August, 1909, the said "George W. Elder" was proceeding down the Columbia River as in the libel averred, and this claimant avers that the said "Elder" was then and there in charge of a full and competent crew and was fully provided with and had all the lights required by law and by the regulations of the United States for steamships of her class and employment, lighted, burning and displayed in the manner required by law and such regulations; that said steamship "George W. Elder," when she arrived at a point between one-half mile and three-quarters of a mile distant from and above the said steamship "Daniel Kern," the said "Daniel Kern" was off the port bow of the "Elder" and her starboard or green light was visible to those in charge of the "Elder," and thereupon and then and there being distant between one-

half and three-quarters of a mile as aforesaid, the "Elder" sounded one loud short blast of her steam whistle as a signal to the said "Daniel Kern" and those in charge of her of the purpose of the "Elder" to pass to the starboard or right hand of the said "Kern" and between her and the Washington shore. That there was then [19] and there and at said time between a thousand and twelve hundred feet of deep water sufficient for the "Elder" to navigate between the said "Daniel Kern" and the said Washington shore; that the said "Daniel Kern" and those in charge of her did not respond to or in any way answer the said whistle or signal of the said "Elder," whereupon those in charge of the said "Elder" immediately put her engines at slow speed and blew another short and loud blast of the steam whistle of the "Elder," again indicating and signalling to those in charge of the "Kern" the purpose and desire of the "Elder" to pass to the right of and between her and the Washington shore as aforesaid, but the said "Daniel Kern" did not immediately respond to the said second signal of the "Elder," but shortly thereafter did respond thereto by blowing two rapid blasts of her steam whistle and after a short interval by blowing two more rapid blasts of her steam whistle; that immediately on the giving of the first two blasts of the steam whistle of the "Kern," those in charge of the "George W. Elder" stopped and reversed her engines and immediately put them at full speed astern, put her helm hard astarboard and did all in their power to check the speed of and back the "Elder" and avoid the said "Kern." That the said

steamship "Daniel Kern" and those in charge of her were negligent and at fault in failing and neglecting to blow one short blast of the steam whistle of the said "Kern" in response to the first whistle of the "Elder," for this claimant avers that there was ample room for the "Elder" to pass to the right of the "Kern" and between her and the Washington shore as she, the "Elder," proposed to do and had indicated her purpose to do by blowing the said single blast of her steam whistle, and this claimant further avers that the said steamship "Daniel Kern" and those in charge of her were negligent and careless and at fault in failing, neglecting and refusing to answer the second single blast of the steam whistle of the "Elder" given as aforesaid [20] by one single short blast of the steam whistle of the "Daniel Kern," for this claimant avers that there was still ample time for the "Elder" to pass to the right of the said "Kern," and there was also, as above alleged, ample space and depth of water to enable her to pass in perfect safety on the right-hand side of the said steamship "Daniel Kern," but this claimant alleges that the said steamship "Daniel Kern" and those in charge of her negligently, carelessly and wrongfully and in entire disregard of their duties refused to allow, permit or consent to the passing of the "Elder" to the right of the "Kern" and between her and the said Washington shore, but, on the contrary, signalled to and notified the "Elder" and those in charge of her not to attempt to pass to the right of the "Kern," and thereupon those in charge of the "Elder" were compelled to and did reverse

her engines and put them full speed astern, and endeavored to back the said "Elder" so as to prevent her from coming into collision with the said "Kern." And this claimant avers that the said "Elder" is equipped with a left-handed wheel, and therefore when she backs she of necessity swings her bow to port and her stern to starboard, and this claimant further avers that when the "Elder" first came in sight of the said steamship "Daniel Kern," the said "Kern" was displaying and operating a powerful searchlight and carelessly and negligently, wrongfully and unlawfully was flashing and directing the same much of the time up the river and frequently into and upon the "Elder" and into her pilot and wheel house, and in such a manner as to embarrass and interfere with those in charge of the "Elder" in directing and controlling her and so continued to do up to the time of the collision aforesaid; and this claimant further avers that had those in charge of the said steamship "Kern," even when the "Elder" sounded her whistle the second time as aforesaid, consented to the "Elder" going to the right, she [21] could have and would have safely passed by the "Daniel Kern," but because of and by reason of the negligent, wrongful and improper acts and conduct of those in charge of the said "Daniel Kern," the said "Elder" was not permitted to go by and pass to the right of the said "Kern," and those in charge of the navigation of the said "George W. Elder" were compelled to and did do all in their power to back her and keep her away from the said "Kern" and at the same time avoid going to the right of her,

and the only way that it was possible for the "Elder" so to do was to reverse her engines and put them full speed astern as she did as aforesaid and put her helm hard astarboard as she did as aforesaid; but by reason of the fact that the said "Elder" was and is a large and heavy ship and had a heavy cargo on board, and by reason of the fact that the current of the river was carrying her downward, it proved to be and was impossible to sufficiently check her speed so as to keep her away from or pass to the port or astern of the "Kern," and because of and by reason of the negligent, wrongful and improper acts and conduct of those in charge of the "Daniel Kern" as aforesaid, the "Elder" came into collision with the said "Daniel Kern" as aforesaid, and whatever of injury was suffered by or afflicted on the said "Kern" was the result of and due entirely to the negligence and wrongful acts of those in charge of the said "Kern" as aforesaid.

And claimant further answering avers that at no time during the time mentioned in the libel or herein mentioned did the said steamship "Daniel Kern" have, keep or maintain a lookout or any lookout, but, on the contrary, those in charge of her negligently and carelessly during all of said time failed to have or keep a lookout on board of said steamship "Daniel Kern." And claimant further answering avers that libelant on the 17th and 18th days of August, 1909, was engaged in transporting [22] rock from a point on said Columbia River about — miles above the place where said collision occurred, to the mouth of said

river, and had been so engaged for and during several months prior to said dates. That libelant transported such rock on barges and employed said steamship "Daniel Kern" and the steam tug "Hercules" in towing such barges. That on the night of August 17th, 1909, the said "Kern" came up said river from the mouth thereof with three empty barges in tow and met the said tug near Waterford aforesaid with three barges loaded with rock in tow. That said "Kern," pursuant to an agreement and understanding with said "Hercules," let go of and left said empty barges at a point a short distance above said Waterford in the channel of said river and in the track or course usually followed by vessels navigating said river, and those in charge of said "Hercules," pursuant to an agreement and understanding with those in charge of said "Kern," let go of and left said loaded barges at the point a short distance above where said collision occurred and in the direct track or course usually and customarily followed by all vessels under way up or down said river. That said loaded barges were so left by said "Hercules" to be picked up and taken in tow by said "Kern" for the purpose of towing the same to the mouth of said river. That in leaving said loaded barges where she did the said "Hercules" and those in charge of her were guilty of gross carelessness and negligence and those in charge of said "Kern" were guilty of gross carelessness and negligence in consenting to and agreeing as aforesaid that said loaded barges should be dropped and left for her, the "Kern," by said "Hercules," at such point or place

in the river, for claimant avers that at said point and for a considerable distance above and below said point the water of said river is of sufficient depth for a distance of one-half mile or more towards the Oregon shore to afford safe [23] navigation for all said barges and for said "Hercules" and said "Kern," and it was the duty of those in charge of the navigation thereof to make such exchange of barges and tows at one side of and at a safe distance from the fairway or regular course of vessels under way up and down said river, but claimant avers that in violation of their duty in such regard, those in charge of said vessels "Hercules" and "Daniel Kern" carelessly and negligently arranged to and did exchange their tows aforesaid at the time aforesaid in the fairway for ships and vessels under way up and down said river. That said loaded barges at the time said "Kern" was making fast thereto preparatory to towing them, and when the "Elder" signalled the "Kern," as aforesaid, had drifted but a short distance down the river from where they were left by the "Hercules" and were still as aforesaid in the ship's fairway or course as aforesaid. That had said "Daniel Kern" been actually under way down said river with said tow or been engaged in making fast thereto off at one side towards the Oregon shore from said course or fairway, the said collision could not and would not have occurred.

V.

And this claimant denies that by reason of said collision so alleged to have been occasioned by the negligence and carelessness or the negligence or

carelessness of those in charge of the "George W. Elder," or otherwise or at all, libelant, as owner of the "Daniel Kern" or otherwise, has sustained damages or any damages in or about the raising or repairs of said vessel or loss of equipment upon said vessel or loss of the use of the said vessel in any sum or amount whatever, and denies that the said collision was so occasioned or was at all occasioned or in any manner occasioned by the negligence and carelessness or by the negligence or carelessness of those or of any person or persons in charge of the "George W. Elder," [24] but, on the contrary, avers that the said collision was caused by the negligence and carelessness and wrongful acts of those in charge of the said "Daniel Kern" as in this answer alleged. Denies that the libelant, as owner of the said "Daniel Kern," or otherwise or at all, has sustained any damages whatever as a result of said collision or otherwise or at all, or as the result of any negligence or carelessness or the alleged negligence or carelessness on the part of those or any of those in charge of the said "Elder," or has sustained any damages whatever in or about the raising or repairs of said "Kern" or loss of equipment upon said vessel or loss of use of said vessel in any amount or in an amount not at present ascertainable or at all. Denies that said alleged losses will aggregate or may aggregate the sum of \$25,000 or any sum or amount whatever, and denies that for said alleged losses or any losses, or for alleged losses or any losses in the sum of \$25,000 or in any sum or amount whatever, the libelant has a lien or any lien or claim

against or upon the said "George W. Elder," or any claim whatever against her owners personally or any claim whatsoever.

VI.

That all and singular the premises are true.

WHEREFORE, claimant prays that this Honorable Court will be pleased to pronounce against the libel herein, and that the same may be dismissed with costs to this claimant to be taxed.

CHAS. P. DOE,
Claimant.

Subscribed and sworn to before me this 30 day of Sept., 1909.

[Seal] C. W. FULTON.

C. W. and G. C. FULTON,
Proctors for Claimant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer by the [25] delivery of a duly certified copy thereof as provided by law, at Portland, Oregon, on this first day of October, 1909, is hereby admitted.

WILLIAMS, WOOD & LINTHICUM,
Of Attorneys for Libelant.

Filed, October 1, 1909. A. M. Cannon, Clerk. [26]

And afterwards, to wit, on Monday, the 3d day of February, 1913, the same being the 76th Judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [27]

In the District Court of the United States for the District of Oregon.

No. 5162.

February 3, 1913.

COLUMBIA CONTRACT COMPANY

vs.

Steamship "GEO. W. ELDER."

Minutes of Court—February 3, 1913—Findings of the Court.

This cause, heretofore submitted to the Honorable Charles E. Wolverton, upon its merits, came on regularly at this time for the ruling and decision of the Court; whereupon, after due consideration, the Court finds the said steamship "George W. Elder," at fault, and therefore responsible to libellant to whatsoever damages the "Kern" has sustained, the amount of said damages to be ascertained for the plaintiffs yet to be adduced. [28]

And afterwards, to wit, on the 3d day of February, 1913, there was duly filed in said court an Opinion, in words and figures as follows, to wit: [29]

*In the District Court of the United States for the
District of Oregon.*

COLUMBIA CONTRACT COMPANY,

Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Machinery,
Tackle, Apparel and Furniture,

Respondent.

CHARLES P. DOE,

Claimant.

Opinion.

PAGE, McCUTCHEON, KNIGHT & OLNEY,
C. E. S. WOOD and IRA A. CAMPBELL,
for Libelant.

C. W. & G. C. FULTON and DENMAN & AR-
NOLD, for Respondent and Claimant.

The Columbia Contract Company was, at the time of the collision herein complained of, the owner of the "Daniel Kern," and was engaged in conveying rock from Fisher's Quarry, situate on the north bank of the Columbia River above Vancouver, Washington, to the Government jetty below Fort Stevens, at the mouth of the Columbia River. Barges were employed in transporting the rock, three being lashed together side by side in such a way that the center barge extended forward of the others nearly half its length. These barges, when so made fast to each

other, were towed by steamers. The steamer made fast to the tow by mooring with her prow from the rear of the barges between those on the outer sides, and in this way the tow, consisting of the three barges, was navigated by pushing it ahead of the vessel. On the day of the accident libelant was operating two tows thus made up, with two steamers, the "Daniel Kern" and the "Hercules." The "Kern" was engaged in navigating the tow, consisting [30] of empty barges, from Fort Stevens up the river to where she met the "Hercules," navigating a tow consisting of loaded barges from the quarry. There the steamers would exchange their tows, and each proceed back to its starting point. Thus the "Kern" operated on the lower river and the "Hercules" on the upper. The reason for this was that the "Kern" was of deeper draft than the "Hercules," and better suited to navigate the waters at the mouth of the Columbia, and the "Hercules," being of lighter draft, could reach the quarry in greater safety. These vessels, during the time they had been thus operating in conjunction with one another, had generally met at some point between Waterford Light and Oak Point above. In making the exchange of tows the "Kern," on meeting the "Hercules," would proceed some distance above, with her empty barges, when she would let go of them, and return to make fast to the loaded barges in tow of the "Hercules."

The "Kern" is a vessel 153 feet in length and about 26 feet beam, and the barges which were being taken in tow at the time of the collision ranged from 142 to 152 feet in length and 35 to 36 feet beam.

On the night of the collision the "Kern" met the "Hercules" somewhat above the Waterford Light, at about 12:30 A. M., the former proceeding up the river to a point abreast of or a little above Cooper's Point, where she let go of her tow well out of and to the south of the fairway or ship's course. The "Kern" then returned, meeting the "Hercules," which had let go the loaded barges, between Cooper's Point and Waterford Light. The "Kern" approached and began to maneuver to make fast to the loaded barges. In the meantime the barges had swung around until they assumed a position nearly crosswise to the stream, their bows pointing slightly downstream and towards the Oregon shore. The "Kern" came up by their stern, heading approximately [31] downstream. Her bow had entered past the port barge quartering so that her nose was pointing nearly to the port quarter aft of the starboard barge, but not touching it; neither was she against the stem of the port barge. A line had been made fast to the starboard quarter of the port barge (the chief officer of the "Kern" says to the port quarter, and that the "Kern's" nose lay past the port quarter of the starboard barge), and as it was about ready to be tightened up from the "Kern," the "Elder" came into collision with her from the rear. There was at the time some slack in the line, one witness saying about five feet, others being not so definite.

The position of the "Kern" and her tow at this time was nearly opposite the Waterford Light, in-stream from the Washington shore approximately 1,000 feet, and practically in the fairway or ship's

course for vessels of heavy draft. The stream was about a mile wide, and navigable for heavy draft ships up to within 100 to 40 feet of the Washington shore, and for a half mile on the other side of the "Kern."

The "Elder" is a ship 250 feet in length, with 38-foot beam, running on the night of the accident with 17 or 18 feet of draft at the stern, and some four feet less at the bow. She is navigated by a screw propeller, and her helm is operated with hand gear. She was proceeding downstream, and struck the "Kern" on her starboard quarter, about 16 feet from her stern, at an angle near 34 degrees, protruding into her to near her middle line, and breaking her wheel-shaft. The "Kern" was thus jammed against the barges on her port side, the barges being thrown around until their bows were headed directly upstream. The "Kern" was shoved around until she stood across the stream, heading towards the Washington shore, where she sank from the injuries sustained.

The night was dark, but clear, and the water slack, [32] with no appreciable current, possibly the first of the flood.

As to these facts, there is no substantial controversy.

Michael Moran, the pilot in charge of the "Kern," relates that, while standing in the pilot-house on the starboard side, looking out of the window forward, he heard one whistle. On hearing it, he went out the door on the starboard side, and saw the "Elder" coming right at him, and appearing to him to be a short

distance away. He took note to ascertain if she changed her course, and, observing no change to shut out her "signal lights," went in and gave four short blasts of the whistle. This was probably a second or so after hearing the first whistle. His first thought was that the "Elder" was going to run him down. After blowing the four blasts he jumped outside again, by the starboard door, on the bridge—stood there for a few seconds, and got one whistle from the "Elder." The "Elder's" course continued as before, and witness could see her green and red lights and her masthead light, having seen the same lights when he heard her first whistle. He could see no change in the "Elder" from the time he saw her before, and she was headed right for him. She was then getting so close that the witness stepped back into the pilot-house, and gave four short blasts—"gave the danger whistle." He sprang outside again to watch the "Elder." She was then coming right head-on, and he noted no change in her course. Waiting awhile, he observed her swinging to port, and, concluding that she was backing, rang the "Kern" full speed ahead to avoid a collision. The "Elder" was then 25 or 30 feet away. The "Kern's" helm was aport. This when the boat got in action would swing her bow towards the Washington shore and her stern in the opposite direction, and bring the "Elder" across on her starboard quarter. Only a few seconds elapsed between the time of the first four blasts given by the "Kern" and the second whistle of the "Elder,"—"only a short time anyway—very short," and probably a second or so between the

"Elder's" second whistle and the "Kern's" last four blasts. The effect of [33] the collision was that the head-line of the "Kern" came tight and swung the barges along her side, heading upstream. If no change had taken place in the "Kern," the "Elder" would have struck her a little aft. Using witness' language: "I had to look right aft from the 'Kern's' bridge, and the 'Elder' was coming right directly astern of me, a little the starboard quarter as near as I knew, but as near as I could judge pretty well astern and headed right for me." The searchlight on the "Kern" was being used to assist the men on the barges, and was not thrown upstream at any time.

The witness was then asked: "What reason, if any, Captain, did you have for responding to the one blast signal of the 'Elder' with four short blasts?"

A. Well, my reason was that I concluded there was nothing going to happen but a collision; that he was going to run right into me and I thought I would warn him of the danger he was approaching.

Q. Why did you think there was going to be a collision? A. Well, I could see by his lights—judging the way he was heading by his signal lights—he was heading right for me all the time. Not making any attempt to alter his course that I could notice.

* * * Q. At that time will you state whether or not he was swinging or whether or not his lights were stationary or how they were? A. They seemed to me to be about steady. He seemed to be coming right head-on to me steady. I couldn't notice any change of his signal lights. If he was swinging I couldn't notice it. Q. How was the room between

you and the Washington shore? A. There was considerable room there, anyway from twelve to thirteen hundred feet of room, as near as I could judge.

* * * Q. In view of these facts, why didn't you give him—respond with a one whistle signal?

A. Well, I would have if he had shut out his green light. I would have given him the regular passing whistle, but he didn't make the attempt to do it and I thought it was my place to give him the danger whistle; on account [34] of laying still and the rock barges on my port bow, I couldn't comply with his whistle to go ahead on the starboard helm, was my reason for doing it." Witness says further that the danger signal on the Columbia consists of four short and rapid blasts of the whistle. To the best of his judgment the "Elder" would have run into the stern of the "Kern" if the "Kern" had not gone ahead on her engine at the time she did. On cross-examination witness said he thought the "Kern" probably moved 30 to 40 feet in the water from dead in the water until the "Elder" struck her, and that there was very little change in her position unless she swung around a little on account of her helm being apart. When he first saw the "Elder" she was probably 800 or 1,000 feet away; it was a dark night, and all he had to go by was the appearance of the masthead light. Then witness was asked: "What did you do when you first saw her? A. Well, the first time I saw her I waited until I see whether he was altering his course or not, and he didn't appear to alter his course one particle by his signal lights, and I jumped in the pilot-house and gave him

four short blasts of the whistle in answer to his one whistle. Q. Did he have to alter his course before you had given him your answering whistle? A. Well, not necessarily. Q. Now, as a matter of fact, the rule requires that you shall give him an answering whistle before he alters the course, doesn't it? A. That is up to me, whether I think I am in danger of being run down. It is up to me to sound the danger signal or up to me to judge whether there is any danger." Further on he says: "When he was heading right for me I thought it was well to indicate the danger he was approaching. That is what made me give the danger signals." Being asked, "And the only thing he could have done when he got the four whistle signal was to reverse his propeller, wasn't it?" witness answered, "Well, he could have went either way or backed up then. It is [35] up to him to judge, according to my notion and according to the rules, too." He further states that, after he let go the empty barges in going down to the "Hercules," he got right close to the loaded barges, the "Hercules" having just backed out in order to let him go in. Being recalled, he testified: "Q. Now, as I understood you yesterday you said the reason why you blew the four blasts was because you could not see him moving over to your starboard at the time he asked for permission to go over there with the one whistle signal; that is correct, is it not? A. That is correct, yes, sir. Q. And he had abundant time to have gone over there when he was a thousand feet away without striking you, had he not? A. He had if he had a mind to do it, yes. Q. And your theory

of the case is that before he got any response from you he should have put his helm over to port and started to make that maneuver? A. That is what I understand the law, to accompany the whistle by the alteration of your helm so as the other man can know what you are doing."

J. E. Copeland, the master of the "Kern," was in the pilot-house at the time of the collision. He had retired to his room and gone to bed, but was awake. The first intimation he had of the approach of the "Elder" was a whistle which he heard from her. He says the "Kern" immediately blew four whistles—"almost immediately, as soon as the pilot could blow the four whistles he blew them." He then heard the "Elder" blow one whistle again, "almost immediately" after the "Kern" had blown the four whistles, and "The 'Kern' blew four whistles again." This was also "almost immediately" after the "Elder" had blown her second whistle. He was on the floor of his room when the "Kern" blew her last four whistles, went from there into the pilot-house, looked out the starboard door, saw the "Elder" coming astern of the "Kern" headed right for her, and could see all three of the "Elder's" lights burning. She appeared as if she were coming down past the stern of the steamer, but heading almost amidships—"maybe a little [36] aft of 'midships." He turned to the wheel and found it over to port, and lashed. About that time the "Elder" struck the "Kern." The latter was then working full steam ahead. She had probably moved 30 or 40 feet—not to exceed 40 feet, when struck. Her stern swung to

port. Witness was of the opinion that had the "Kern's" helm been put hard to starboard, and the ship worked full steam ahead, she would not have gotten out of the way of the "Elder" at the time he saw her, as "they were too close. She (the 'Kern') could not possibly have gotten out of her way." He was then asked, "How soon did you see them after the last four whistles were blown? A. Well, it could not have been more than a few seconds, because just as the four whistles were blown he gave a bell to go ahead, and that was at the time I was stepping in the pilot-house, and I immediately went to the starboard side, looked aft and saw the 'Elder.' Q. How far aft would you think the 'Elder' was away at that time? A. I would not think she was over forty feet." He further says that, on hearing the signal from the "Elder," he would have done as the pilot did in sounding four whistles, and he would have put her helm apart and turned her full speed ahead; that if the "Kern" had succeeded in getting out of the way, with the "Elder" headed as she was when he first saw her, the latter would have struck the barges. At the time of the collision the "Kern" was swinging, which would bring her over at an angle with the "Elder" whether the latter was swinging or not. Using the language of witness a little further on: "The 'Kern's' movement would have thrown us to the side of the 'Elder's' bow whether the 'Elder' would have been swinging or not. If the 'Elder' had come directly ahead, you understand, the movement of the 'Kern' would have directed the 'Elder' right into our starboard side." Witness was of the opin-

ion that if the "Elder" had been on a swinging course to port for 1,000 feet she would not have hit the "Kern," because she would probably have stopped before she got that far. If she was on such a course for 500 feet and had been directly behind [37] the "Kern," she would not have struck, but she was a little to the starboard of the "Kern."

Joseph O. Church, the master on the "Hercules," says he passed the "Elder" "just a little below Cooper's Point—not much; * * * probably a thousand feet offshore." The "Elder" exchanged one whistle with the "Hercules," the "Elder" giving the first whistle. After passing the "Elder," witness heard the "Elder" give a passing signal with one whistle, and the "Kern" responded with four short whistles. The signals were "pretty close" together—"about the usual time." Right afterwards the "Elder" blew another whistle, and the "Kern" again responded with four. The "Kern" answered supposedly a quarter of a minute after the "Elder" signalled. Witness heard the crash when the collision took place, and at that time was just about to his barges, "just about going in between" them.

George Hale, the mate on the "Hercules," heard the exchange of signals between the "Elder" and the "Hercules" and the "Elder" give a passing signal afterwards, and the "Kern" give the danger signal, four short whistles. A little further on he says, "I heard the 'Kern' blow her danger whistle twice. The 'Elder' only blew once to my knowledge." The "Elder" blew her whistle to the "Kern" just as the "Hercules" was abreast of her.

Hans Jensen, assistant engineer on the "Kern" and in charge at the time, heard the signal from the "Elder" and reply from the "Kern" repeated as described by other witnesses. After the exchange of signals he received signals from the bridge of the "Kern" full speed ahead, and acted accordingly. This was not over five or ten seconds after the second series of whistles was given, and it was not over fifteen seconds until the collision occurred. Later the witness says about half a minute. The engine, he says, had probably made between [38] 50 and 60 turns when it occurred, and the vessel would get some way at 25 revolutions.

Charles W. Spaulding, the engineer on the "Kern," was in his room at the time, but heard the signal from the "Kern" with four whistles, and heard that repeated, and after that a succession of whistles, then the crash. He was of the opinion that one or two minutes elapsed between the time of the first and second four whistles of the "Kern."

Arne Arneson was a deckhand on the "Kern," on the fore-castle-head at the time. He heard the signals exchanged between the "Elder" and the "Kern": first a signal, one whistle, from the "Elder," answered by four short blasts from the "Kern," and about—not quite a half a minute afterwards, the 'Elder' blew one whistle again." Then the "Kern" blew four short blasts again. The head-line was at the gypsy-head, and witness was about to "heave in on it," and the boat was going to back up to swing the barges around so it "could get into them." Witness saw the "Elder" at the time he

heard the first signals exchanged, and says she was about a half mile above, "right astern of us," and that he could see all her lights. He saw her while she approached, and she did not change her lights until after she blew her second whistle, when "she kind of swung off to the Washington shore." At the time he heard the bells signalling the engineer, the "Elder" was from 50 to 75 feet away, and was headed about midship of the "Kern." On cross-examination witness said he thought the "Elder" was "just abreast Cooper's Point" when he heard her first whistle, and that about two minutes' time elapsed before she struck the "Kern"—"between two and three minutes."

Arthur Nissen testifies that he was fishing at the time opposite Eureka cannery, perhaps a mile out, and heard the exchange of whistles between the "Elder" and the "Kern." He [39] says the "Elder" blew one whistle, the "Kern" answered with four, and this was repeated, and that an interval elapsed between the various whistles of perhaps a half minute. He heard the collision, and knew that the "Kern" sank, as her lights disappeared.

Edward Anderson was chief officer on the "Kern," and on the forecastle-head at the time of the collision, directing in getting a line to the tow. He saw the "Elder" approaching, saw all her lights, which indicated that she was coming head-on, noticed her at Cooper's Point when she blew her first whistle; she was shifting her course from Cooper's Point, which would be about a quarter of a mile from the "Kern." The "Kern" answered with four whistles

immediately. Next the "Elder" blew one whistle, and the "Kern" blew four. A very short interval elapsed between the "Elder's" second whistle and the "Kern's" four, and the collision occurred very shortly after the "Kern" blew her second four whistles; it "might have been a minute—a minute or so." Witness continued to observe the "Elder's" approach, and the same lights were visible all the time. After the "Elder" blew her second whistle, he sang out to the men on the barges to let go the line, in trying to get clear, as he saw there was to be a collision. A signal full speed ahead was given the "Kern" about this time, which was a couple of seconds before the collision, but the "Kern" "didn't pick up much." The "Elder," when he saw her astern, was running for the "Kern's" quarter.

On the part of the respondent W. H. Patterson, the pilot on the "Elder" was called, and testified that the maximum speed of the "Elder" is 11 or 12 knots; that she minds her helm "first-class," has a left-hand propeller, and backs to the starboard, thus throwing her bow to port, and, if running under full speed, she will swing to port. When he rounded Cooper's Point he saw a vessel ahead which proved to be the "Kern." He [40] could not see any sidelights, which indicated to him that the vessel was going downstream. His course after passing Cooper's point was down the Washington shore, aiming to keep off all the way from 600 to 800 feet in the locality where the "Kern" was lying. On that night when he saw the "Kern" his course would have

taken him in the vicinity of 400 feet from shore. When he received the signals from the "Kern," he testified he must have been 1,500 feet or more away—"about fifteen hundred, between twelve and fifteen hundred feet." The other vessel was then on his port bow. Witness further relates that, when he first came down by Eureka channel and came around Cooper's Point, he saw a vessel ahead and pulled his vessel around so he had the former on his port bow about a half point, which position he maintained until he got a signal from her, the same being in response to a signal from him. He then ordered the officer on the bridge to stop his vessel and put her engines full speed astern, which was done immediately. This threw her stern to starboard and her bow to port. The signal from the "Kern" he interpreted to be "either a cross-whistle or a danger whistle," and he supposed there must be some obstruction in the water ahead. He struck the "Kern" at about right angles. The response he got from the "Kern" was to a second signal he had given; he had given one before the signal that the "Kern" answered. On cross-examination he says he met the "Hercules" with the light barges in tow probably a quarter of a mile above Cooper's Point; that when he got the danger signals and put his ship full speed astern, he knew there was danger ahead of some kind, that he could see an obstruction ahead and knew a collision was imminent. He ported his helm just after passing Cooper's Point, so as to put the "Kern" on his port bow, which course was designed to put the vessel down by the "Kern" about 400 feet off

the Washington shore. Supposedly this course would take him 200 feet from the "Kern." Witness [41] further says he ordered his helm to starboard at the same time he put his vessel full speed astern, for the purpose of throwing the ship off as much and as quickly as possible. He blew one whistle after rounding Cooper's Point, and just after he ported his helm. To this he received no reply, and then he blew another whistle "a few minutes, almost immediately after," when he found the "Kern" did not answer. Using the language of the witness: "I seen I had plenty of room on the inside and I told the officer on the bridge to blow another whistle, for I seen I had plenty of fairway to go about my business clear." By backing and starboarding the helm, he expected both to stop the vessel before reaching the "Kern" and to steer clear of her. Witness further says he slowed his ship down when he blew the first whistle. He was then asked and answered as follows:

"Q. Captain, if your steamer is running full speed ahead—exactly what I asked before—if your steamer is running full speed ahead, can you stop her within three-quarters of a mile? A. Well, as I said a minute ago, it depends entirely upon circumstances—depends upon— Q. Under the conditions that prevailed there that night, we will say? A. Well, I ain't able to say. I might have said that there, but I don't know as I could tell exactly. As I said to Edwards at that time, I couldn't tell. Q. Did you say you could or no, sir, you couldn't do it? When you told Captain Edwards you

couldn't. He said, 'How long does it take the "Elder," backing full steam astern, to check her headway? A. Well, I should judge in the neighborhood of probably three minutes. You see, we was making—well, yes, in the neighborhood of three minutes.' When you made that answer you had in mind the conditions prevailing that night? A. I might have said that. Q. (Continues reading.) 'Couldn't her headway be stopped and her going astern within three-quarters of a mile? A. No, sir. Q. It couldn't? A. No, sir. Q. You [42] couldn't reverse and back her full speed astern and check her headway in three-quarters of a mile? A. No, sir.' Now, you didn't misunderstand Captain Edwards' question, did you? A. I don't suppose I did. Q. Now, then, you knew then that when you backed your engine full speed astern within a distance of 1,000 to 1,500 feet of the 'Kern' it was absolutely hopeless to stop before you reached the 'Kern'? A. No, I didn't. I thought it would swing her far enough so she wouldn't catch us. Q. To port? A. Yes. Q. You knew you couldn't stop the ship within that distance? A. I wasn't sure; might have stopped her." Later he further testified: "Q. Now, then, Captain, when you came around Cooper's Point and gave the first signal, of one blast to the 'Kern,' you didn't know whether it was safe for you to go by or not, did you? A. I did at that time, yes. Q. You did? A. Yes, because I could see I had this vessel on my port bow and there was an opening there; could have gone through on my own business. Q. Did you know

the conditions ahead? A. No. As far as I could see at that time and the conditions in the— Q. You don't know whether it was safe or not? A. I could go there. Mr. Denman.—Do you contend it wasn't safe in there? Q. You didn't know it, did you, Captain? A. Yes, the indication looked favorable to me—it was all right—I could go down with safety. Q. So you continued on your course? A. I did, certainly. Q. Despite the fact you received no response from the 'Kern'? A. I kept on my course because she was on my port bow and I knew I could go by safely, so far as I could see. Q. Nothing there so you couldn't get through? A. Not at that time." Later he answered: "We are supposed to blow a half a mile off, and as far as my judgment would allow me, I blew a whistle a half a mile off" (the first whistle) "after I got around the point."

[43]

Edward Whiteman, the third mate on the "Elder," says in effect that, after the "Elder" rounded Cooper's Point and sighted the "Kern" and got straightened out, she was steering down for Waterford Light, inside of the "Kern" and barges, so that the "Elder" had her on her port bow, in which course the "Elder" continued until she was cross-signalled, being about 1,200 feet away when the cross-signal came. The "Elder's" engines were reversed, she put full speed astern with her helm starboarded, the purpose being to make her stern swing to starboard and her bow to port, which would give her a curving course through the water. She struck the "Kern" on that course. Witness was of the

opinion that if the "Elder" had been right behind the "Kern" and 500 feet away, there would have been no difficulty in clearing her to starboard, and unquestionably none if the "Kern" had been 1,000 feet away. Witness says he kept ringing the telegraph full speed astern because he could see they could scarcely avoid a collision. Being so close to the "Kern," it was necessary to have all the steam possible to stop her. He was under the impression that the "Kern" blew two whistles twice, though "there is room for a doubt." He saw the reflection of the towing lights on the "Kern" at the time he blew the first whistle, and knew she was there heading down the river, but didn't know it was the "Kern." The "Elder" blew one approaching passing signal as she was rounding Cooper's Point on the starboard helm. Immediately on blowing the first whistle, witness "slowed the ship down dead slow," and kept on his course. Getting no response whatever to the first whistle, he blew a second whistle, and then came "the two short whistles twice," which indicated that the "Kern" either wanted the "Elder" to go over [44] on the other side, or else there was an obstruction in the river that he could not see, "that there was danger somewhere,"—"We were so close to him that the only thing we could do was to stop and reverse full speed astern.

* * * On either theory, we could not do anything else." On cross-examination he said he repeated the signal, he supposed, within about a couple of minutes or so. Witness says: "When he didn't give us a response to our first whistle, I slowed the

ship down and then blew again the same signal, one whistle to indicate that I wanted to pass on his starboard with our port side, between him and the Washington shore." The time elapsing between the two signals was anywhere from a minute to a minute and a half. Witness continued as interrogated: "Q. Well, then, which whistle was it you didn't get response to? A. The first whistle. Q. Then did you continue running on towards her? A. After slowing the ship down, yes, sir; but we were clear of him; we had him on the port bow. Q. You did? How far? A. Oh, about half or three-quarters of a point. Q. And how far would that bring you off the Washington shore? A. Off the Washington shore? Q. Yes. A. Well, it would have brought us away off, clear of the Washington shore. We were all right as far as the Washington shore was concerned. Q. Bring you about four hundred feet, would it? A. Yes. Q. And if you had her a point or three-quarters of a point on your port bow, that would shut out your green light, from her, wouldn't it? A. Our green light? Q. Shut out your green light from the 'Kern,' wouldn't it? A. It should, yes. Q. And if it didn't shut your green light out, then you didn't have her a point or three-quarters on your port bow? A. No, we didn't." Witness could see the "Kern's" lights when he was a little above Cooper's Point. [45]

Harl Asktedt, the quartermaster, saw some lights after the "Elder" rounded Cooper's Point, and so far as he could remember the "Elder" had the "Kern" about a half point on her port bow. He

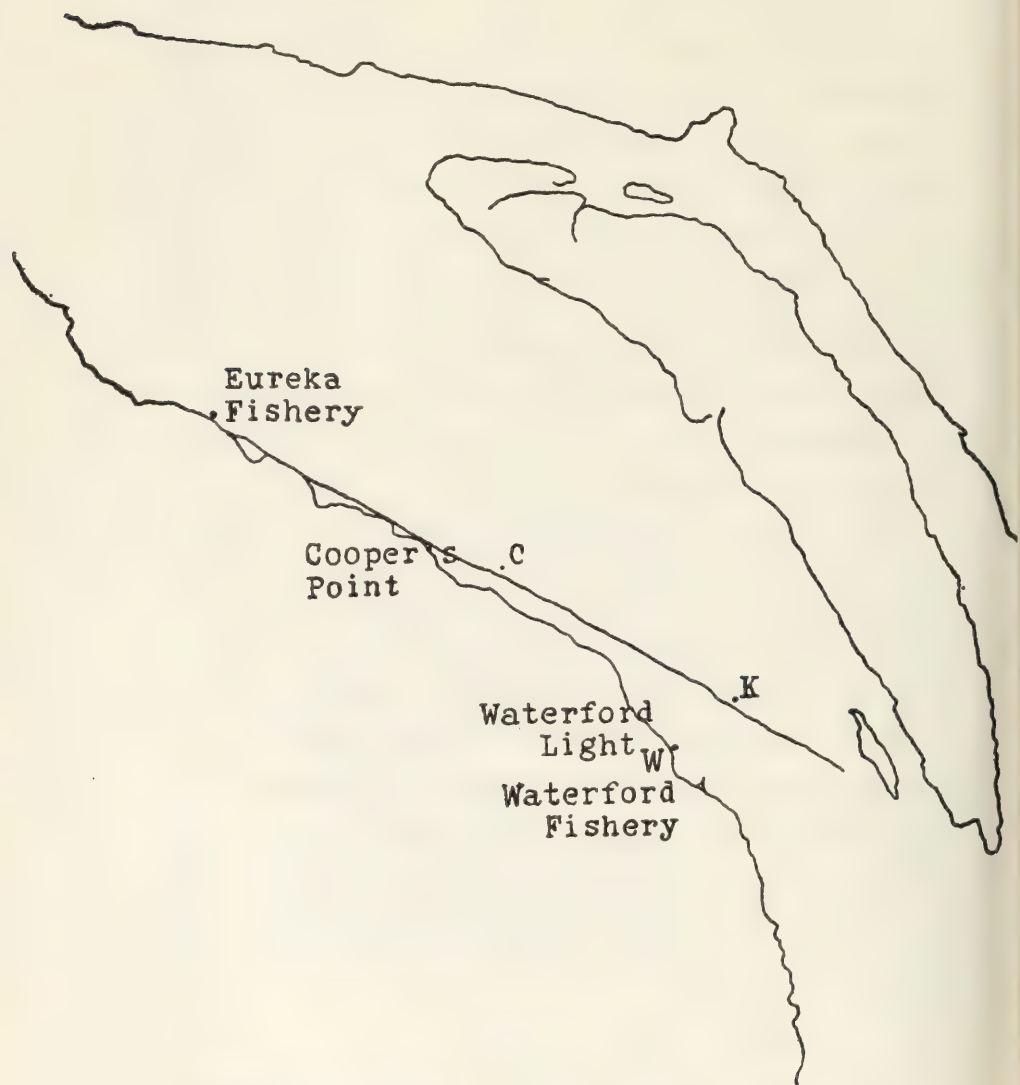
thought the "Elder" was about three-quarters of a mile from the "Kern" when she blew the first whistle, and about one-eighth of a mile when she blew the second. At that time he got command to put the wheel apart, and then hard to starboard, and to stop her full speed astern. The orders were executed. So far as he remembered, they got no response to the first whistle. Then the "Elder" blew another whistle, and the response was either two or four whistles. The "Elder" was put astern as soon as she got the response. She blew the second whistle immediately after the first. She struck the "Kern" almost immediately after he got his wheel hard over to starboard. The "Elder" did not swing much, so far as he remembered.

Louis Olson, a lookout on the "Elder," testified the "Elder" blew one whistle when she was about three-quarters of a mile away from the "Kern," then she blew another, and at the time the "Kern" was about a point on the "Elder's" port bow. The "Elder" was about 1,000 feet from the "Kern" when the second whistle was blown. The response was to the second whistle. The witness says: "The first they blowed one whistle. Then they blowed one more—they didn't answer the first whistle; then they blowed one more and then they answered with two."

WOLVERTON, District Judge:

The question to be resolved is which of these two vessels was at fault in bringing on the [46] collision, or whether both are blamable for their part in

the affair. The following is a rough chart of the river and its shore lines at and near the place of collision:



"K" represents the place where the collision occurred. "C" is a designation for Cooper's Point, made by counsel in the examination of one of the

witnesses. It is claimed by libelant's counsel that Cooper's Point is approximately five-eighths of a mile above the place of collision, which is probably near the correct distance. The line from "C" to "K" [47] shows approximately the ship's course for vessels of the class and size of the "Elder." As they round Cooper's Point and pick up Waterford Light, they bear away from the Washington shore on or near the line indicated until they pass the point where the collision occurred. I speak of rounding Cooper's Point. As a matter of fact, the change in course is only slight, as the vessels run near the Washington shore for some distance above. The "Elder," on the night of the accident, according to the testimony of her officers, had just rounded or passed Cooper's Point and had straightened up, not on her regular course, but on a course a half-point to starboard of the "Kern," the "Kern's" presence in the river below having been discovered at that time, and the pilot intending to bear off the Washington shore opposite the "Kern" some 400 feet, which would leave the "Kern" to the "Elder's" port from 300 to 600 feet; thinking, as he says, he could go in through there with safety. It was then that the officers say they blew one whistle as a signal to the "Kern" that the "Elder" intended to pass to her starboard, the ship running nearly at full speed. This would put the distance of the "Elder" above the "Kern" approximately half a mile when the "Elder" gave the signal. She slowed up, her officers say, but continued on her course a half point to the starboard of the "Kern," and, getting no

response from the "Kern," she subsequently blew another whistle, a single blast as before. At this time Patterson, the pilot on the "Elder," puts his distance from the "Kern" at from 1,000 to 1,500 feet, and it was then, according to witnesses for the "Elder," that they got the first response from the "Kern." They [48] were not certain whether the response was a cross or a danger signal. The vessel was at once ordered hard astarboard and full speed astern. The "Elder" being constructed with a left-hand propeller, the effect of the execution of the order would be to throw her bow to port and her stern to starboard, thus giving her a curving course to port. The "Elder" was executing this maneuver when she struck the "Kern."

On the other hand, the officers and deck-hands of the "Kern" say they heard the first signal given the "Kern" by the "Elder," and that the "Kern" answered at once with the danger signal, four short blasts. Very shortly the "Elder" gave another signal, which was also answered as before, with four short blasts. The "Kern" was heading approximately downstream. Such being her position, the "Elder," if steering on her usual or the ship's course, would be approaching from an angle astern. This will be at once apparent from the above sketch. Moran, the pilot on the "Kern," thinks the "Elder" approached directly for the stern of the "Kern," as if she were going to split her up the center. The mate and the master concur in the view that the "Elder" was approaching, not directly from the stern, but heading for the "Kern's" starboard quar-

ter or midships. All the witnesses on the "Kern" agree that the lights of the "Elder"—port, starboard and masthead lights—were all plainly visible as she approached the "Kern" until after the "Elder" began swinging to port. It was almost at this instant that the collision took place, or so shortly after that it was difficult to estimate the time. In the course of her maneuver to get in between the barges constituting her tow, the "Kern's" helm had been thrown to port, and on observance [49] of the near approach of the "Elder" she was ordered full speed ahead. The effect of the execution of this order would be to throw her stern to port and bow to starboard, thus increasing her angle with the usual ship's course. Moran says she had begun to execute this maneuver, and had proceeded ahead 30 or 40 feet when the "Elder" struck her. The "Elder" struck her starboard quarter at an angle of about 34 degrees. This is a physical fact shown by the course of the "Elder's" bow as it extended into the hull of the "Kern."

Captain Church, in charge of the "Hercules," relates that while navigating his vessel upstream to pick up the empty barges, he exchanged the passing signal with the "Elder," and that the "Elder" signalled the "Kern" just as she was passing the "Hercules" below Cooper's Point, inside of 1,000 feet. First officer Hale on the "Hercules" lends corroboration to this. Captain Patterson's custom was to signal the vessel ahead when about half a mile distant. From these witnesses it would appear that the "Elder" sounded her first signal to the "Kern"

when approximately half a mile distant, and this I am constrained to believe to be the fact. However, the "Elder" may have been nearer, and possibly somewhat farther away. No implicit reliance can be placed upon the estimate of the witnesses on board the "Kern" as to how far distant the "Elder" was when she blew her first whistle, as they were looking into the darkness, without physical objects by which to determine the fact with relative accuracy. At the distance of a half-mile away, if the "Elder" kept her speed, say from ten to twelve miles per hour (she was probably running at a faster rate), she would reach the "Kern" in from 2½ to 3 minutes, [50] the "Kern" being dead in the water. The "Elder," however, I am led to believe, slowed down, which would increase the time relatively. It is further probable that her speed was not greatly checked until the pilot's order to put her full speed astern was executed, as there is no evidence that her engines were backing, so that she was running at a stiff rate up to that juncture.

All the witnesses on the "Kern" speaking as to the fact, concur in the statement that the "Elder" was heading almost, if not directly, for the "Kern," for they saw all the "Elder's" running lights, which is a demonstration in itself and discredits absolutely the testimony of the officers on the "Elder" to the effect that she was running on a course having the "Kern" a half-point on her port bow. If she had been, the evidence would indicate that the "Elder's" green or starboard lights would have been shut out from the "Kern," and as the "Elder" approached

the angle would have been increased, more perfectly obscuring her green light. It is problematic as to just how near the "Elder" had approached the "Kern" when she blew her second whistle. The distance is variously estimated from 1,000 or 1,500 feet to very near at hand. Arneson says, "She was pretty close to us then." From either point of view, she kept her course until that time; that is, she was either running directly for the "Kern," or with the "Kern" one-half point on her bow; in my view, directly for the "Kern."

A thing which appears to be practically certain is that the "Elder" at this point put her helm hard astarboard, and reversed her engines to full speed astern, which gave her a curving course to port, and yet she collided with the [51] "Kern." From the expert testimony, it would seem that if she had been 1,000 feet distant when she began to execute the maneuver, she would probably have cleared the "Kern" and her tow, or stopped before reaching her. If within 500 feet, the result would have been problematical. Possibly she even then would have cleared the "Kern." This would make it appear that the "Elder" was not much, if anything, beyond 500 feet from the "Kern" when she began to execute her maneuver to port, and she might have been much less.

As to whether the "Kern" gave response to the first passing signal of the "Elder," there is a sharp conflict in the testimony. The officers of the "Kern," consisting of the pilot, first officer, mate, chief and assistant engineers, and a seaman, all con-

cur in saying they heard the response given to both the first and the second signal of the "Elder." Besides these witnesses, the captain of the "Hercules" and a fisherman testify that they heard all the signals—two from the "Elder" and two, consisting of four short blasts, from the "Kern," and the mate on the "Hercules" heard both responses. All the witnesses on the part of the "Elder" testifying to the fact say they did not hear any response whatever to the first signal of the "Elder." Applying the rule that the testimony of witnesses affirming that they heard or saw a thing is entitled to greater weight than the negative testimony of other witnesses who affirm that they did not hear or see it, the greater credence must be given to the testimony of libellant's witnesses.

As applicable to collision cases, it has been held that: [52]

"The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation."

The *Alexander Folsom*, 52 Fed. 403, 411.

See also *The Alberta*, 23 Fed. 807, 810; *The Sam Sloan*, 65 Fed. 125, 127.

Further than this, I am impelled to the firm conviction that the "Kern" gave prompt response to the first signal of the "Elder" with four short blasts of her whistle; and not only this, I am of the opinion that the officers of the "Elder" testifying, or at least one or more of them in authority, did hear such

response from the “Kern,” and that the “Elder” is chargeable with positive knowledge that it was given. I base this latter deduction the more readily upon the testimony of the captain and mate of the “Hercules” and the fisherman, who were even less advantageously situated for hearing such signal than the officers of the “Elder.”

Now, to apply the rules of navigation, which constitute a cardinal factor in determining the fault and to which of the two vessels it is attributable. As a preliminary statement to the rules adopted by Congress approved June 7, 1897, relating to the prevention of collision upon certain harbors, rivers and inland waters of the United States, it is premised that a vessel is under way when she is not at anchor or made fast to the shore or ground. According to this, the “Kern” was a vessel under way. An overtaking vessel “shall keep out of the way of the overtaken vessel.” Art. 24. [53]

“When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel

astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

Rule VIII.

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Art. 27.

In view of these rules, it is clear that it was the bounden duty of the "Elder" to keep out of the way of the "Kern." Having heard the response to the "Elder's" first passing signal, the duty was imposed upon the "Elder" not to attempt to pass the [54] "Kern" until such time as it could be safely done, at which time the vessel ahead is required to signify her willingness by blowing the proper signal. This makes the vessel ahead the judge as to when the overtaking vessel can safely pass. The "Elder" slowed down, but kept her course—this in face of the fact that she was steering straight for the "Kern," and approaching her at a rapid rate. Con-

tinuing in this way, the "Elder" again asked permission to pass. The "Kern" again refused; and then it proved too late to avoid the collision, for it occurred in spite of the energetic efforts of the "Kern" to prevent it.

The fact that the "Elder" struck the "Kern" at an angle of 34 degrees in no way conflicts with the theory that the "Elder" was steering straight for the "Kern." It is altogether probable that the "Kern" was pressing ahead at the instant with her helm aport, which carried her stern somewhat to port, and the "curving" motion of the "Elder" would naturally bring her into collision at some angle. The "Elder" should have been eagerly mindful of her rapid approach to the "Kern" on the course she was steering, and should have avoided running so near to the latter as to put her in peril of a collision. Under the circumstances, she was at liberty to depart from the letter of the rules and steer to the starboard of the "Kern," notwithstanding the refusal of the latter to let her pass—this to avoid "immediate danger." Art. 27, Sup. See *The North Star*, 151 Fed. 168, 172.

The expert witnesses, including Moran and Anderson of the "Kern," seemed to be of the view that if the "Elder" had steered to starboard at a distance of 1,000 feet, or even 500, she would have avoided the "Kern." She would have avoided her absolutely, and without question, if she had been running on [55] the course of a half-point to port of the "Kern" when the first signal was given, and continued on that course. Furthermore, if she had so continued until she gave the second signal, the prob-

abilities are that she would by that time have so indicated her course to the "Kern" that the latter would have signified permission to pass as requested.

Supposedly at that time such would have been the case. Counsel for respondent suggest that the response given by the "Kern" indicated, not only that the "Kern" was in jeopardy, but that it was not safe for the "Elder" to pass on any course, to starboard of the "Kern" or between her and the Washington shore. The clear reply to this suggestion is that the "Elder" knew the river, and knew also that the "Kern" was engaged in navigating barges downstream, and it is not at all probable that she was so misled by the signals of the "Kern." Such is my conviction. But if it be that the "Elder" did not hear the response to her first signal, it was a grave fault to approach so near to the "Kern" on the course she was running as to jeopardize the situation. She should either have done what she did do in the extreme, or have departed from the rules and gone to starboard of the "Kern." In either event, the collision would not have happened. This would be the case whether she knew the "Kern" was "dead in the water" or moving. The emergency was one which she ought to have been on her guard about. She knew that the "Kern" and "Hercules" were in the habit of exchanging tows in the river, and she met the "Hercules" almost at the very time that she sounded her first signal to the "Kern," and ought to have known that the "Kern" was likely to be engaged in the very thing that she was trying to do at the time, namely, to pick up her tow. [56]

I do not deem that it was a contributing fault on the part of the "Kern" that she was picking up her tow in the fairway. The *James T. Easton*, 27 Fed. 464. She certainly had a right to navigate with her tow in the fairway, and I have been cited to no authorities holding that she was remiss in using the fairway to make fast to her tow.

It is stoutly urged that the "Kern" was rendered in fault because Moran refused permission to the "Elder" to pass, under a mistaken interpretation of Rule VIII. Moran watched to ascertain whether the "Elder" changed her course after signaling for permission to pass, before he acted, and, observing no change, he refused permission. He candidly concedes that his impression of the meaning of the rule was that it required the "Elder" to change her helm before the assent should be given. In this he was in error, for the rule requires the contrary, that is, that the overtaking vessel shall change her course upon receiving assent from the overtaken vessel—not before, but after receiving such assent.

The question is a serious one, and not free from difficulty; but I have concluded that the mistake of Moran was not the proximate contributing cause of the collision. I am satisfied that Moran did not refuse his consent to the "Elder" to pass arbitrarily, or with any wanton purpose of vexing her or impeding navigation. He assumed for his own safety that he ought to withhold his assent because the "Elder" was heading directly for his boat, upon the mistaken idea that she ought to have changed her course at once after signalling for permission to pass the

“Kern.” The “Elder,” nevertheless, should have heeded the signal from the “Kern,” and if she had, and had acted with the same energy that she did on getting the second [57] signal from the “Kern,” there would have been no collision. The only damage that either boat would have sustained would be some delay to the “Elder.” Thus it is manifest that the proximate cause of the collision was the omission of the “Elder” to take prompt action upon getting the response from the “Kern,” to avoid if possible any contact with the latter. I reach this conclusion the more readily from the circumstance that the “Elder” was the overtaking vessel, charged not only with the duty of keeping out of the way of the “Kern,” but also with the burden of showing that the fault of the collision was with the “Kern.” The reasoning of Betts, District Judge, in *The Governor*, Fed. Cas. No. 5645, is apposite:

“If the ‘Worcester’ and the ‘Governor’ had been running in opposite directions, the collision might, probably, have been deemed to be so far the result of mere casualty and misadventure as to leave each vessel to bear for herself the consequences of the accident falling upon her. But the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. In the light of this principle, the circumstances of the present case manifestly cast the burden of proof upon the ‘Governor.’ She was astern, and was seeking to run

past the 'Worcester.' She had a right to the advantage of her superior speed, and under such circumstances it would have been tortious and blameable conduct on the part of the 'Worcester' designedly to intercept the 'Governor,' to crowd her off, or to baffle her in that effort. But it devolves upon the 'Governor' to show the prudence of her own conduct, as well as to prove negligence or misconduct on the part of the [58] 'Worcester.' It was not the duty of the latter boat to veer from her course so as to open a passage for the 'Governor,' or to lend her any facility in aid of her purpose to pass. We may censure any rigid adherence to strict right by which one competing boat interposes embarrassments in the way of her competitor, and may regret the want of a magnanimous and liberal course of conduct which might relieve a vessel of superior speed and endeavoring to get ahead, from delay or difficulty in accomplishing that object. But the Court is only empowered to adjudicate the legal rights of the one and the responsibility of the other."

See also the reasoning of the Court in *The Fontana*, 119 Fed. 853, 856.

This leaves but one other contention to dispose of, which relates to the fact that the "Kern" had no designated lookout in service at the particular time. The absence, however, of such a lookout was void of any causative effect in bringing on the collision. The officers in charge of the "Kern" discovered in due time the approach of the "Elder," and the action

taken was in pursuance of such discovery, and of the movement and signals given by the "Elder."

I hold therefore that the collision was due solely to the fault of the "Elder," and that she must stand accountable for whatever damage was inflicted upon the "Kern." The amount of the damages must be ascertained from testimony yet to be adduced.

Filed Feb. 3, 1913. A. M. Cannon, Clerk. [59]

And afterwards, to wit, on the 12th day of April, 1912, there was duly filed in said court the Testimony taken before the Court, in words and figures as follows, to wit: [60]

In the District Court of the United States for the District of Oregon.

IN ADMIRALTY.

COLUMBIA CONTRACT COMPANY,

Libelant,

vs.

The Steamship "GEORGE W. ELDER," etc.,

Respondent.

Proceedings Had February 5-8, 1912.

IRA A. CAMPBELL and C. E. S. WOOD,
Attorneys for Libelant.

WILLIAM DENMAN and C. W. FULTON,
Attorneys for Respondent.

C. E. WOLVERTON, Judge.

Portland, Oregon, February 5, 6, 7, 8, 1912.

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Mr. DENMAN.—Your Honor, it has been stipulated that all we shall try at this time, before your Honor, with your Honor's consent, is the question of liability. The question as to damages, involving a considerable amount, will be reported thereafter to a master, and that evidence offered as the parties produce it. That, I understand, is the stipulation.

COURT.—All the evidence as to damages shall be taken before a master?

Mr. DENMAN.—Unless there may be some incidentally at this time, but the question before the Court now is the question of responsibility, and not the question of amount of responsibility.

Mr. CAMPBELL.—Except for this one fact: We did that in view of your Honor's going to San Francisco, we understood, on the 10th, and Col. Wood was under the impression that this case must be finished by Friday evening, and in view of the fact that we will probably have all we can do to get the question of liability alone, we have stipulated to take up only that at this time. If, however, we find we are finishing this case so as to have an opportunity to go into the element of damages, I suppose counsel will be willing to take it up at that time.

Mr. DENMAN.—Well, I would like to have the matter decided now. We have to get together our witnesses for that; it is an entirely separate thing; involves what was done with the vessel subsequently and at the yard, and I think it will be safer if we now stipulate to turn that over to a master; it is a detail matter—purely a matter of accounting. [62]

COURT.—The Court can give you the whole week, if necessary. I would rather get through by Friday evening, if I could.

Mr. WOOD.—We will take that matter up among ourselves at the conclusion of to-day's session. [63]

Testimony of Daniel Kern, for Libelant.

DANIEL KERN, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

Mr. Kern, what, if any, position did you hold with the Columbia Contract Company, at the time the "Elder" ran into the "Kern"?

(Testimony of Daniel Kern.)

A. President and manager.

Mr. DENMAN.—If your Honor please, we agreed to the sequestration of the witnesses. I want to have with me the master who was on board at the time, to guide me in cross-examination—the pilot, but other than that, I will excuse all my other witnesses. I request sequestration of the witnesses, and under the practice, as I have known it, you are allowed to have the master with you to guide you in the trial of the case; other witnesses must be excluded.

Mr. WOOD.—No objection, except with regard to Mr. Kern, who is only the corporation manager, and without personal knowledge of the facts, and we also want the master of the “Hercules”—of our two boats, at the same time. All our witnesses will be excluded, except Mr. Kern, who is the corporation manager, and the master and pilot of the “Kern.”

Mr. DENMAN.—These two witnesses are witnesses we desire to cross-examine on the occurrences there, and we desire the cross-examination of the one to be not in the presence of the other.

Mr. WOOD.—Which two?

Mr. DENMAN.—The master and the pilot of the “Kern.” [64]

Mr. WOOD.—Then we would like to have with us the pilot of the “Kern.”

COURT.—Very well; all the other witnesses will leave the courtroom, and with the exception of the two named, will remain outside until they are called.

(Testimony of Daniel Kern.)

Mr. CAMPBELL.—You don't want to include in that Captain Crowe, who was not there at the time?

Mr. DENMAN.—No.

Q. Who owned the "Daniel Kern" on the 18th day of August, 1909, at the time of the collision?

A. The Columbia Contract Company.

Mr. CAMPBELL.—That is all.

No cross-examination.

Witness excused. [65]

Testimony of Michael Moran, for Libelant.

MICHAEL MORAN, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL.

Were you on board—How old are you, Captain?

A. I was born in 1863.

Q. What, if any, license did you hold as a master mariner?

A. Master and pilot's license, and branch pilot's license. Well, master and pilot's license for inland waters, for the Willamette and Columbia rivers, up to the time of that collision.

Q. How long have you held a master's license?

A. Well, nine years, eight or nine years, I believe—ten.

Q. How long during that period have you acted as master of steamers on the Columbia River?

A. Pretty near all the time—master and pilot.

Q. How long have you acted as pilot on the river?

(Testimony of Michael Moran.)

A. Well, since last March.

Q. Well, I mean prior to this collision had you acted as pilot?

A. Oh, prior,—well, somewhere around six or seven years—

Q. On what class vessels?

A. I think six or seven years; I am not sure.

Q. On what classes of vessels?

A. Well, on the tug “Sampson,” the “Vosburg,” the cruiser, and on the “Daniel Kern”—pilot.

Q. Were you on board the “Daniel Kern” at the time the “Elder” ran into her? A. Yes, sir. [66]

Q. Who was in charge of the navigation of the “Kern”? A. At the time of the collision?

Q. Yes. A. I was.

Q. Where were you at the time of the collision?

A. I was right on the bridge of the “Kern.”

Q. What do you mean by “the bridge”?

A. Well, outside the pilot-house; right by the side; the starboard side of the “Kern”—bridge.

Q. I will show you a photograph and ask you whether or not that is a picture of the “Daniel Kern” as she was the night of the collision. A. Yes, sir.

Q. Now, where is her pilot-house on that photograph? A. Right there, sir. (Indicating.)

Mr. CAMPBELL.—I will offer this photograph in evidence.

Mr. DENMAN.—No objection.

(Photograph marked “Libelant’s Exhibit 1.”)

Q. What time did you go on watch, Captain?

A. At twelve-ten.

(Testimony of Michael Moran.)

Q. 12:10. And where had—what had the “Kern” been doing up to twelve o’clock?

A. She was towing light barges up the river, under way—steaming up the river with three light rock barges.

Q. What are those barges?

A. Three rock barges; we was on our way up from Ft. Stevens.

Q. What were the barges used for?

A. For handling rock—towing the rock from Fisher’s Quarry down to Fort Stevens.

Q. Where is the quarry located? [67]

A. Fisher’s Landing—up the Columbia River, on the Washington side.

Q. Just describe to the Court the way the business of transferring the rock from the quarry to the jetty is conducted.

A. Well, we—the “Hercules,” as a rule, takes the three loaded barges from Fisher’s Landing on the Washington side of the Columbia River, halfway down the river until whatever time she meets the “Kern” or the “Sampson,” whichever boat is towing, and they exchange tows wherever they meet in the river; and whenever they meet, why the boat that is going upstream stops the three light barges as much out of the way as they possibly can—out of the channel, and they leave them there, while the other boat does the same thing with the loaded barges, and the boat that lets go the light barges gets out from between them, and goes around and hooks on to

(Testimony of Michael Moran.)

the loaded barges; that is what we term exchanging tows.

Q. I will hand you a photograph and ask you what it is, if you know.

A. That is the steamer "Hercules."

Q. What doing?

A. Going down stream with loaded barges.

Mr. CAMPBELL.—I will offer this in evidence.

(Marked "Libelant's Exhibit 2.")

Q. What is this other photograph I hand you?

A. That is the "Daniel Kern."

Q. What doing?

A. Going downstream with loaded rock barge.

Mr. CAMPBELL.—I will offer this in evidence also.

(Marked "Libelant's Exhibit 3.")

Q. Where is the quarry located at which the barges are loaded? [68]

A. Located five or six miles above Vancouver on the Washington side of the river.

Q. Will you state whether or not it is customary for the tug which takes the loaded barges from the quarry to push them all the way to Ft. Stevens?

A. Is it customary? It wasn't at that time; no, sir.

Q. Was it customary at that time for the tug bringing the empty barges up from Ft. Stevens to take them all the way up to the quarry? A. No, sir.

Q. At what point on the river was the exchange of the barges generally made?

A. At any point from Oak Point down to Water-

(Testimony of Michael Moran.)

ford, or Westport, for that matter; generally wherever they met; sometimes one boat or the other may be a little behind, and they keep on going until they meet each other.

Q. How long had you been pilot on the steamer "Kern" prior to the collision?

A. About three weeks, I guess.

Q. Three weeks. During all that time, where was it customary to exchange tows with the "Hercules"?

A. Well, anywhere between Westport Light and Oak Point.

Q. Now, where is Westport Light?

Mr. DENMAN.—Pardon me, Mr. Campbell. Let me ask, at this time, whether this word "customary" which you are using has reference to the practice of this company.

Mr. CAMPBELL.—Yes, certainly.

Mr. DENMAN.—That is all you mean?

Mr. CAMPBELL.—By this company; no other company is on the river, towing these rock barges.
[69]

Mr. DENMAN.—That is all right—not a general custom.

Mr. CAMPBELL.—There is no general custom; there is no other company engaged in this business; this company alone is engaged in this line of business. I am asking now with reference to where these two tugs of the Columbia Contract Company exchanged tows or barges.

COURT.—Very well.

Q. I will hand you this chart, Captain, and ask you

(Testimony of Michael Moran.)

whether or not that shows the location of the collision.

A. Yes, sir; it shows the exact—the exact position—place the collision occurred, right there.

Mr. CAMPBELL.—If there is no objection, I will offer this in evidence. It is a hydrographic chart.

(Marked “Libelant’s Exhibit 4.”)

Q. Now, can you show me, Captain—between what points did you say it was customary to exchange?

A. Well, anywhere between—anywhere between Westport Light and Oak Point. Sometimes we have to go further up the river; depends on whether one boat or the other should be delayed on either end.

Q. Can you mark on this chart Oak Point?

A. Right in here. Oak Point is about in here somewhere.

Q. I will mark on the chart Oak Point. How far is it above Eagle Cliff?

A. Oh, about three or four miles, I guess; three and a half miles. That is Eagle Cliff.

Q. Where is Bunker Hill with respect to Oak Point?

A. That is above it about a mile or a mile and a half, above Oak Point.

Mr. FULTON.—What is this in here?

A. That is a sawmill. [70]

Q. Where, with reference to Grim’s Island, did you usually exchange your barges at the uppermost point of the river?

A. That would be up above here, sometimes go up as high as Walker’s Island.

(Testimony of Michael Moran.)

Q. How far above Grim's Island?

A. Walker's Island would be probably four miles above Grim's Island.

Q. Is Westport shown on this chart?

A. Right here; Westport ought to be right in here somewhere.

Mr. CAMPBELL.—You may resume the chair, Captain. Westport is not shown on that chart. I thought the chart ran down farther.

Q. What time did you say you came on watch, Captain?

A. I came on deck about ten minutes past twelve—twelve-ten.

Q. Had you at that time let go of the light barges.

A. No, sir.

Q. Did you afterwards let go the light barges?

A. Yes, sir.

Q. At what point, if you know?

A. About at Cooper's Point; a little above Cooper's Point—probably right abreast. I stopped the ship right abreast Cooper's Point—stopped the engine right there.

Mr. CAMPBELL.—If the Court please, this is an enlarged chart of this same section of the river which was furnished me by United States Engineers. I don't want to call them to identify the chart unless counsel insists.

Mr. DENMAN.—It isn't necessary, Mr. Campbell. We may want to call them to explain some of the details of it, but no question about the accuracy of the drawing so far as it goes.

(Testimony of Michael Moran.)

Mr. CAMPBELL.—I offer this enlarged chart in evidence.

(Marked “Libelant’s Exhibit 5.”) [71]

COURT.—Will you let the witness locate Cooper’s Point on that map? (Indicating Libelant’s Exhibit 4.)

Mr. CAMPBELL.—Yes.

Q. Will you locate Cooper’s Point on this?

COURT.—And mark it with some designation.

A. Cooper’s Point is right here.

Q. Point marked with capital “C”?

A. Yes, that point right here.

Q. Is that the point?

A. Yes, that is Cooper’s Point.

Q. And will you also locate the Waterford Light on that chart?

A. Waterford Light stands right in here. Right that point is where Waterford’s Light is.

Q. The point where I marked “W”?

A. Yes.

Q. What is the black spot marked there just below the light? A. That is the Waterford canneries.

Q. Is Waterford Cannery marked “Waterford Canneries” on the chart?

A. “Waterford Fishery,” I believe, it is marked.

Q. Waterford Fishery. Now, will you locate upon this enlarged chart marked “Libelant’s Exhibit 5,” Cooper’s Point, Captain?

Mr. FULTON.—It is marked there, isn’t it?

A. There it is, right there.

Q. Marked Cooper’s Point? A. Yes.

(Testimony of Michael Moran.)

Q. And what is the star just below Cooper's Point—what does that represent?

A. That is Waterford Light.

Q. Waterford Light.

COURT.—That is marked Waterford Light, is it?

A. Stake Light. [72]

Q. It is marked Stake Light, is it? A. Yes, sir.

Q. Mark it with a "W," too. A. Yes, sir.

Q. Now, Captain, where did you drop the light barges?

A. Well, a fraction above Cooper's Point and well over towards the Oregon shore.

Q. Where, with respect to the main channel, the main steamship channel?

A. Well, we were over to the Oregon shore—the Oregon side of the steamship channel, probably an eighth of a mile—between an eighth and a half—quarter of a mile practically.

Q. What time was that?

A. That was about 12:30 or 12:35.

Q. And what did you do after you let go the light barges?

A. Why, turned right around and went downstream to where the loaded ones was opposite the Waterford Light.

Q. And how far offshore, off the Washington shore, in your judgment, were the loaded barges at the time?

A. Well, I should judge they were off from 1,000 to 1,200 feet.

Q. And where with respect to the Waterford

(Testimony of Michael Moran.)

Light? A. Right abreast of it.

Q. In what position were the loaded barges lying at the time you went to them?

A. They were lying heading towards the Oregon shore.

Q. How were they—in what position with respect to each other were the rock barges—the loaded barges?

A. Well, they were made up, you know, as a regular tow alongside and one ahead—one in the middle.

Q. Where did you pass the “Hercules” after you let go the light barges?

A. Well, between Cooper’s Point and the Waterford Light.

Q. And what was the “Hercules” doing at that time? [73]

A. She was proceeding on up to take hold of the light barges.

Q. What was the first intimation that you had that the steamer “Elder” was approaching?

A. Not until I heard his one whistle.

Q. Where were you at the time?

A. Laying right at the barges—laying, standing still.

Q. How were your barges fastened or moored?

A. Well, they were moored right alongside each other; only one is generally out ahead.

Q. That isn’t what I meant. Were they anchored or moored to the bottom at all?

A. No, sir; they were just laying still there.

(Testimony of Michael Moran.)

Q. What was the condition of the tide and current?

A. I should judge about slack water there at that time—low water slack; it probably was low water slack or first of the flood at the time the collision occurred.

Q. Do you recall at this time? A. What?

Q. Do you recall at this time what the water was?

A. Yes, I remember likely, will say low water slack, or first of the flood, if anything.

Q. Did you observe anything as to the condition of the current in the river?

A. No, sir; nothing unusual.

Q. How, if at all, were the barges moving at the time that you came up to them?

A. They weren't moving any at all that I could notice. Of course, I wasn't—just simply heading for the Oregon shore and appeared to set still there, you know. If moving at all they were moving that way, but I couldn't notice it. [74]

COURT.—Those were the loaded barges?

A. Yes, sir.

Mr. CAMPBELL.—If the Court please, I should like to use this table, if I can, with the models. When the models are put in position, I want the positions marked on this drawing paper so that we may have a permanent record.

COURT.—Very well.

Q. Captain, if you will just come down here, I think we can get at this better. Now, assume that the line that I draw across this paper, which I mark

(Testimony of Michael Moran.)

“Oregon shore” is the Oregon shore, simply for the purpose of giving us direction. I want you to take these models and show me, if you can, the position in which the barges were at the time that you approached them.

Mr. CAMPBELL.—First, I will offer the paper in evidence.

(Marked “Libelant’s Exhibit 6.”)

Q. I want to know first, whether these models bear any resemblance to the barges themselves?

A. Just exactly, as near as I can—

Mr. DENMAN.—They are drawn to scale, are they?

Mr. CAMPBELL.—The barges are to scale.

Mr. DENMAN.—Both the barges and the tug are to scale—and the steamer?

Mr. CAMPBELL.—Yes.

Q. Now, Captain, by means of these models, I want you to show me the position of the barges with respect to the Oregon shore at the time you approached to make fast.

COURT.—Which is downstream and which is up?

A. This is downstream according to that (indicating right-hand side of the paper.)

Mr. CAMPBELL.—We will consider this second line I have [75] marked as the Oregon shore. I will erase the other. In the first place I want to know the position of the barges as you approached them to make fast.

A. (Witness arranges models.)

(Testimony of Michael Moran.)

Q. First you saw them now with reference to the Oregon shore?

A. Might have been swung around there.

Q. Now, will you take your pencil, or may I with consent of counsel, just draw the outline?

A. I will hold them down while you do it. (Mr. Campbell traces outlines of boats.)

Q. Now, this I mark "downstream" is downstream, is it? A. Yes, that would be downstream.

Q. Indicated by the arrow.

Mr. DENMAN.—Now, this drawing, as I understand it, does not purport to represent distances. No scale of distance. Simply the angle to shore.

Mr. CAMPBELL.—This drawing purports to show just what I ask for, the position with respect to the Oregon shore.

Mr. DENMAN.—Does not give distance. I wanted to make sure.

Mr. CAMPBELL.—No, no, I am not going into that.

Q. What did you do with your tug after you left the light barges?

A. Well, I left the light barges upstream and just turned around the starboard helm and came downstream and went up to these light barges and found them in that position.

Q. Did you receive any whistles from the "Elder"? A. Not at that time.

Q. Did you afterward receive any whistles from the "Elder"? A. I did.

Mr. WOOD.—You said with reference to the light

(Testimony of Michael Moran.)

barges in this position.

Q. Did you mean the light barges or the loaded barges? [76]

A. These represent the loaded barges when I got to them.

Q. These barges represent the loaded barges to which you went? Now, where were you at the time that you heard the "Elder's" first whistle?

A. I was in the pilot-house of the "Elder"—the "Kern."

Q. Where was the "Kern"?

A. The "Kern" was lying right here.

Q. Now, will you take the model of the "Kern" and place it, with respect to these barges, in the position it was at the time you heard the "Elder's" first whistle?

A. Yes, sir; there is about the way she was (placing model).

Q. I want you to place it just where she was, yourself.

A. That is about where. She might have been a little more head.

Q. Place it just where you think—not might have been a little more head. Give us your idea about it.

A. Right here. (Mr. Campbell outlines the model of "Kern.")

Q. At the time that you heard the first whistle of the "Elder," what lines, if any, did you have out from the "Kern" to the barges?

A. Just in the act of getting one head-line out from the port bow—just had got it out, in fact.

(Testimony of Michael Moran.)

Q. From the port bow of what?

A. The "Kern."

Q. To what? A. To this barge here.

Q. To which barge is that?

A. The upstream barge.

Q. Well, how else do you distinguish the barge?

A. The port barge, I would call it.

COURT.—Have those barges names?

A. No, sir; they are numbered.

COURT.—That is the port barge with reference to your ship?

A. Yes, sir; that would be the port barge with reference to my ship. [77]

Mr. WOOD.—In references to each other facing the masts, it would be the left-hand barge.

Mr. CAMPBELL.—(Marking outline of barges on Exhibit 6.) Have I correctly marked the barges—starboard barge, port barge, center barge and "Kern"? A. Yes, sir, so far as I know.

Q. Now, will you take the pencil, Captain, and draw me upon this chart—draw the line which you say was passed from the "Kern" to the port barge?

A. Yes, sir, it would be from here—from the chock on the port bow to—

Q. You draw it, go ahead. Take your hand out of your pocket and put some life in it.

A. There you are (drawing).

Q. Now, just mark the line. Mark it "line." (Witness does so.) Now, when you were in that position, what signal, if any, did you get from the "Elder"? A. One whistle.

(Testimony of Michael Moran.)

Mr. DENMAN.—That is leading. This is the very essence of the case, when these signals came. Ask what happened.

Mr. CAMPBELL.—I have just had him indicate the position of the vessel, on the chart, when he heard the first whistle from the “Elder.” Now I ask what whistle he heard when he had the boat in that position. A. I heard one whistle.

Q. Where were you standing at the time you heard the one whistle?

A. I was standing in the pilot-house looking out of the window forward.

Q. Which side of the pilot-house?

A. The starboard side, or where—the starboard side of the pilot-house that would be. [78]

Q. What did you do?

A. I went out to the door and looked astern to see where the whistle came from.

Q. Which door did you go out of?

A. The starboard door of the pilot-house.

Q. And what did you see?

A. Well, I looked out and saw the “Elder”—well, now, I didn’t know who she was at first, but saw a ship—steamer—vessel coming with all lights right at me, and appeared to be a short distance away from me, as I thought.

Q. What did you do then?

A. Well, I didn’t see—I noticed to see if any change in her course and I didn’t see her alter her course or shut out the signal lights, so I went in and gave four short blasts of the whistle.

(Testimony of Michael Moran.)

Q. What did you intend to convey by four short blasts, if anything?

Mr. DENMAN.—I object to the question as going to the intention of the witness. The blasts had a definite meaning.

Mr. CAMPBELL.—That is the meaning I was after.

Q. Where were you at the time you gave the four blasts, Captain?

A. I was in the pilot-house where the whistle string pulls. I went in the pilot-house—I went back in the pilot-house, you know, after I decided he was heading right for me without changing his course.

Q. When, with respect to the time that you heard the first whistle from the “Elder,” did you give the four short blasts to which you refer?

A. Oh, probably a second or so. Just as I—just watched the “Elder” and at the same time went to the pilot-house and [79] didn’t notice whether she changed her course or anything—her signal lights—and I made up my mind she was coming right for me, going to run me down. My first thought was—

Q. Did you make any record of the intervals of time— A. No, sir, I did not.

Q. —which transpired between the various incidents leading up to the collision? A. No, sir.

Q. What did you do after you heard—after you blew the first four blasts of your whistle?

A. I jumped outside again to watch the “Elder.”

Q. Where did you go outside?

(Testimony of Michael Moran.)

A. On the starboard side.

Q. Where to on the starboard side?

A. Starboard railing on the side of the bridge.

Q. Can you show me upon this photograph marked Exhibit 1?

A. Yes, I came right out here.

Q. Will you put a cross upon that place?

COURT.—That is the instream side?

Mr. CAMPBELL.—Near the Washington side.

COURT.—The instream side?

Mr. WOOD.—The downstream side from which the “Elder” was approaching—no, the upstream.

COURT.—The “Elder” was approaching from the rear?

A. Yes, the “Elder” was coming downstream.

Mr. CAMPBELL.—Just as though passing her, the “Elder” going down. This is the Washington and this is Oregon.

Mr. FULTON.—In other words, the “Elder” was supposed to be back up here, up this way.

Mr. CAMPBELL.—I will just mark here the Washington shore [80] to indicate the direction, but without reference to distance.

Q. Now, Captain, what, if anything, happened after you went out to the starboard railing of the “Kern”?

A. Well, I stood there for a few seconds and I got one whistle from the “Elder.”

Q. What was the “Elder’s” course with respect to what had been before?

A. Just exactly the same. I couldn’t notice—

(Testimony of Michael Moran.)

Q. What lights, if any, could you see at that time on the "Elder"?

A. Saw the green lights—red light, and her mast-head light.

Q. What lights, if any, had you seen on the "Elder" when you heard her first whistle?

A. Saw the same lights, port and starboard lights, red, green and white lights, masthead light.

Q. What change, if any, had there been in the position of the lights of the "Elder" between the first and second whistles which she blew?

A. None that I could notice.

Q. How, in your judgment, was she heading at that time with respect to your boat?

A. She was heading right for me.

Q. What did you do after you received her second blast?

A. Well, she was getting so close that I jumped to the whistle as quick as I could and gave them four short blasts—gave the danger whistle.

COURT.—That is the danger signal?

A. Yes, that is the danger signal.

Mr. CAMPBELL.—Provided by statute, not less than four short blasts.

Mr. DENMAN.—But note, not four. Not less than four. There may be a question arise there because four signals has another definite meaning. [81]

Mr. CAMPBELL.—But four signals, you will admit, is the danger signal?

Mr. DENMAN.—It may be or it may not be.

Q. What did you do, Captain, after you blew the

(Testimony of Michael Moran.)

second series of four short whistles?

A. I jumped outside again to watch the "Elder."

Q. And where was she then?

A. She was then coming right head-on.

Q. What position, if any, did you—what change, if any, did you note in her position at that time?

A. None at the time I went out, but I waited a while and I noted she was swinging about her head to port, and I concluded he was backing; he was then about twenty feet away.

Q. What did you do?

A. Well, the bell is right by me and I rang my vessel full speed ahead as soon as I noticed his boat swinging away from me which the rules give me that privilege to do, trying to avoid a collision.

Q. What bell did you give?

A. Full speed ahead.

COURT.—With your ship?

A. Yes, sir.

Q. And what was the position of your helm when you rang full speed ahead?

A. My helm was aport at that time.

Q. Which way would that direct the course of your vessel?

A. Swing towards the Washington shore.

Q. And what with the stern of your vessel?

A. Swing towards the Oregon shore.

Q. And where would that swing it with respect to the lights on the "Elder"? [82]

A. Would swing the "Elder" across on my star-board quarter.

(Testimony of Michael Moran.)

Q. What do you mean by that?

A. Well, swing her around—swing the “Elder” more on my starboard quarter.

Q. How far distant, Captain, in your judgment, was the “Elder” from the stern of your vessel when you rang full speed ahead?

A. Pretty close; 25 or 30 feet, probably. Of course, I couldn’t say exactly, but I thought I had time to get clear of her so she wouldn’t have collided with me.

Q. How long an interval elapsed between your first four blasts of the whistle and the second one blast of the whistle of the “Elder”?

A. Oh, a few seconds, not very— Of course, I could not say; only a short time anyway—very short.

Q. What time elapsed between the “Elder’s” second blast and your four blasts of the whistle—your second four blasts?

A. Well, it was no time at all; just as quick as I could get in and blow them—probably a second or so.

Q. Where did the “Elder” strike you?

A. Took us on the starboard quarter.

Q. And what did you do after she struck you?

A. Well, I just—all I could do was to stay there and hold her true.

Q. What did you personally do, I mean?

A. Me, I just stayed right there.

Q. Stayed right there?

A. Stayed right on the bridge.

Q. About how long did you remain on the bridge?

(Testimony of Michael Moran.)

A. Oh, fifteen or twenty minutes before she sunk; until the "Hercules" came down and took us off.
[83]

Q. What, if any, effect did the striking of the "Elder" have upon the "Kern"?

A. Well, slough her around, you know, slough her heading towards the Washington shore.

Q. What did it do with the barges?

A. The head-line came tight and it swung the barges right head upstream.

Q. What do you mean by head-line?

A. This head-line I had to this port barge.

Q. The line you marked? A. Yes, that is right.

Q. What did it do with that?

A. Dragged the barges up and this barge here struck her right here—right alongside the port side on the "Kern." Swung right alongside the port side with head upstream.

Q. How, far, in your judgment, had the "Kern" moved ahead between the time that you rang for full speed ahead and the moment of the collision?

A. Well, she didn't move very far because this line became tight immediately—guess approximately 20 feet or so.

Q. Did you measure the distance at the time?

A. No.

Q. What kind of a night was it?

A. Dark, starlight night with clear atmosphere, calm with no wind.

Q. Will you show me by means of the model of the "Elder" the position in which you judge her to be

(Testimony of Michael Moran.)

at the time that you gave the full speed ahead signal to the "Kern"?

A. Show it by this diagram here?

Q. Yes.

A. Well, I should think she was about like that.

[84]

Q. I want merely the direction. I don't want distance. I merely want direction.

A. As near as I could see from looking from up here, the starboard side of the bridge, this is the way she appeared to me.

Q. I want your judgment about it. Is that where it is? A. As near as I could judge.

Mr. CAMPBELL.—(Drawing.) Ship marked "Elder" on this drawing.

Q. Now, I want you to take the barges and the model of the "Kern," and show me the position in which the barges—the relative position of the barges and the "Kern" immediately after the "Elder" struck you, so as to show how their positions had been affected by the blow of the collision.

A. I understand you want to see the position of the barges after the collision?

Q. Yes, and the position of the "Elder" also, assuming this is the Oregon shore.

Mr. WOOD.—If you are not going to show distance, you are taking a great deal of unnecessary paper.

Q. Assuming what I have marked is the Oregon shore, No. 2. I will offer this drawing as a separate exhibit.

(Testimony of Michael Moran.)

(Second drawing marked "Libelant's Exhibit 7.")

Q. Now, do you understand what I want, Captain? I want you to take the models of the barges and the "Kern" and place them in the position that they were after the "Elder" struck the "Kern," so as to show us how, if at all, the "Elder" affected their relative position as they were before the collision.

A. Well, here we go. Just swung right around like that as near as I remember; probably they were more upstream, we will say. We will move them up that way. That is when I last saw them; that is the way they were. [85]

Q. How soon was that after the collision?

A. That was immediately. I walked aft before the "Elder" backed out from where she went into the cut.

Q. What do you mean when you say before she went into the cut?

A. Before she got out of the cut.

Q. Before she was stuck in there?

A. Before she was stuck in the "Kern"—while she was stuck in there, I meant to say, I walked aft; saw the "Elder" here and looked to see if anybody on the "Elder's" bow. I went over and saw the barges then; at that time they went alongside.

Q. Whereabouts did you stand, Captain, at the time you walked aft to see the "Elder"?

A. Well, I climbed over this railing here, this iron railing.

Q. What railing is that?

(Testimony of Michael Moran.)

A. An iron railing that goes around the upper deck of the "Kern."

Q. Which side the deck?

A. Aft the starboard side and I got aft—couldn't get further aft than here.

Q. Just mark with a cross on the after deck where you walked. A. Well, walked here.

Q. How about the cabin—did you walk outside the cabin or not?

A. No, about over there. I can put it above here.

Q. At the position to be marked "X"?

A. Yes, right over that "X."

Q. Now, where did you stand with respect to the cut in the side of the "Kern," forward or aft?

A. Forward of it at that time. You mean when I went around?

Q. No, when you went back.

A. I stood on the port side, on the port side of it and abaft the "Elder's" stem. [86]

Q. On the port side and abaft the "Elder's" stern?

A. Yes, that would indicate in here according to this diagram.

Mr. FULTON.—According to the model?

A. According to the model.

Q. Which side did you walk down?

A. Down the starboard side; from forward aft along the starboard side until I come abreast that cross—have put that cross. I found the iron railing bent in across and I turned around and walked around this same house and aft again on the port side of the "Kern," and the "Elder's" stem was

(Testimony of Michael Moran.)

still in her. I put my hand on the "Elder's" stem and looked up to see if anybody up there and I didn't see; and I went forward after that and saw the barges then beginning to go around from the "Kern."

Q. Now, you went forward which way?

A. Port side.

Q. When, if at all, did you see the barges?

A. Saw them just at that time when going forward on the port side, and they were getting away from the "Kern" a little ways.

Q. How were they located with respect to the "Kern"?

A. They were right alongside there and some of the men—the crew, was going over on the barges. At the time I went forward I saw them.

Q. As you recall, have you placed them as they were at that time?

A. As I remember that is about the way they were as the "Elder" struck us. That is upstream, isn't it?

Q. This is upstream. A. Hold on, now.

Mr DENMAN.—Hold on, you testified they were in that position.

Mr. CAMPBELL.—Go on.

Mr. DENMAN.—I want them as they were in the first instance.

Q. I want your fair, honest, judgment. There is no catch about [87] this. I want your honest judgment as to the location of the barges.

A. Now, the "Kern" was still in here. Is that

(Testimony of Michael Moran.)

in order for me to go on and explain?

Q. Yes, you mean the "Elder."

A. The "Elder" was still stuck, I mean the star-board quarter. Well, we swung around; as soon as the barges got away she swung around. As I walked forward along the port side the barges were getting away. I walked up along here about along this side here. The barges were then getting away. They were in this position. They got away and no more of the men—only myself and the mate and the chief engineer and the cook left, and one oiler on the boat. The rest were on the barges. The other men couldn't get over there.

Q. I want you to place, Captain, the position of the barges and the tug at the time that you saw them when you walked forward from aft on the port side after going to the bow of the "Elder."

A. Well, they was here. The barges were heading—that is upstream. The barges were heading up here; they are now probably a little more this way.

Q. You place the models. That is what they are here for.

A. That is as near as I can. They were probably in that shape, as near as I remember.

Q. That is your best judgment, your best recollection? A. Yes.

Mr. DENMAN.—Before the model is drawn, you mean that this is the way or the way you first had it, straight?

A. At the time that I was going forward she had been that way, right alongside.

(Testimony of Michael Moran.)

Mr. CAMPBELL.—I object to cross-examination while I am [88] making my examination. You will have all the opportunity you want to tie this man up on cross-examination.

A. Now, the “Kern,” you know, she was headed toward the Washington shore; after the barges got away from here the “Elder” still stood and worked astern so she headed in to the Washington shore.

COURT.—That is the position, now, while you were walking down the port side?

A. Yes, your Honor.

Mr. WOOD.—Immediately after the collision?

A. Immediately after the collision, or at the time of the collision, rather. The “Elder” was still stuck in the side of the “Kern.”

Q. Now, indicate the starboard barge and the port barge.

A. This is the starboard barge, this is the head barge.

Q. We will call it the center barge.

A. All right—the port barge (indicating).

Q. Now, can you show me also upon this drawing by means of the model of the “Elder,” the position that the “Elder” occupied with respect to the “Kern”? A. At that time?

Q. At the time that you walked from the aft end of the vessel to the forward part on the port side?

A. Yes, sir; right there.

Q. Is that, in your judgment, the way they were?

A. As near as I—to the best of my judgment that

(Testimony of Michael Moran.)

is the way each stood—that is the position. (Mr. Campbell draws them in.)

Q. Now, Captain, how long did the “Elder” remain in the hole that she had cut into the “Kern”?

A. Well, as near as I remember, she remained there probably three or four minutes—four or five minutes.

Q. And what effect did it have upon the “Kern”?
[89]

A. Well, it had the effect of these barges—got these barges drove away from us and had the effect to turn the “Kern” around and head him toward the Washington shore at right angles.

Q. Now, take the two models—take the model of the “Kern” and show where it was.

A. (Taking models.) Is that what you mean? Just had that effect, to turn her around like that, head her in that way toward the shore.

Q. Place the “Kern” in the position you think she was.

A. Well, there; kept on turning here.

Q. Have you got it in the position that you think it was? A. Yes, sir; as near as I remember.

Q. What did the “Elder” do after she swung you around to the position that you last marked?

A. She backed out; she backed astern. She went astern and lay out here in this direction, as near as I remember.

Q. What do you mean by “this direction”?

A. Well, he backed out from the “Kern”; backed upstream and over in here.

(Testimony of Michael Moran.)

Q. Which direction was that?

A. Between the "Kern" and the Washington shore.

Q. Between the "Kern" and the Washington shore. And what did the "Elder" do after that?

A. She lay there for a considerable time and someone asked me if they could give me any assistance, and I said they could give me a line to tow to shallow water so she wouldn't sink there; didn't get any reply and didn't hear any further about it. And after a while one of the officers of the "Elder" came over and I was on the "Hercules"—after I got off the "Kern." Came over and asked me some questions concerning if anybody was drowned or hurt or anything. I told him I didn't think so; by going over to look at the barge he would find out. They were all over there. [90]

Q. Now, how near to where the "Kern" sank did the "Elder" remain after the collision?

A. Well, just a short distance off.

Q. Upstream or downstream or where?

A. In between me and the Washington shore on the upstream side of her.

Q. What did you do after the "Kern" got into the last position which you have shown with her head toward the Washington shore?

A. What did I do myself?

Q. Yes.

A. I just stayed around there; I couldn't do anything.

(Testimony of Michael Moran.)

Q. What did you do—you must have done something.

A. Yes, I kept on blowing the whistles for the “Hercules” to come.

Q. What kind of whistles?

A. Distress whistles.

Q. What were they?

A. Several short whistles. Continuous blowing of whistles—continuously blowing them every once in a while until I got some other boats to come and tow that boat into shallow water.

Q. Go ahead now and tell us the rest of the story, just what happened after that.

A. Well, the “Weown,” she didn’t come for quite a while. The “Hercules” heard my whistles and let go the light barges and come down; anchored the light barges up above and just as he got there the “Kern” commenced to sink, the after part of it, and going downstream. Just as he got there I had to jump. The mate he missed; he jumped overboard and we helped him aboard out of the water—Mr. Anderson.

Q. What became of the crew?

A. The “Kern’s” crew? They were on the rock barge. The chief [91] engineer got into the barge; we lowered him down a little while before she sunk; lowered him with the cook and the oiler.

Q. How far off the Washington shore, Captain, do you think the “Kern” sank?

A. About a thousand feet; anyway from a thousand to 1,200 feet, I don’t exactly know.

(Testimony of Michael Moran.)

Q. When did you put your helm to port before you rang your full speed ahead signal?

A. I had that apart the very minute I got down to the barges, after I got the ship stopped at the barges. The tug stopped at the barges; I put my helm port to port with the intention of backing her, and on account of having left-hand propeller would help that way; that was my object in doing that at that time.

Q. What reason did you have for making fast to the barges in the position as shown by Exhibit 7?

A. Well, I put that head-line there with the object in view of backing up the "Kern" to swing the barges head downstream to get in between them.

Q. In what position would you have them to push them downstream?

A. What position would I have them?

Q. Yes, with respect to your boat.

A. I would have them right ahead of me then.

Q. Where would the port and starboard barge be?

A. Would be on the starboard bow after I swung downstream.

Q. Where would the port barge be?

A. Port bow.

Q. The center barge? A. Right ahead.

Q. Now, Captain, if when you went ahead on your engine full speed you had shifted your helm to starboard instead of to port, what effect would that have had upon the course of your steamer?

A. It would have thrown her—it would have—the starboard helm [92] would have thrown her head

(Testimony of Michael Moran.)

toward the Oregon shore and the stern toward the Washington shore.

Q. Where would it have thrown her head with respect to the rock barges?

A. Would have thrown them right into her—right up against them.

Q. And where would it have thrown the stern of the “Kern” with respect to the “Elder”?

A. It would have thrown the “Elder” probably on our port quarter.

Q. On what port quarter?

A. On the port quarter of the “Kern.”

Q. On the port quarter of the “Kern.” Now, then, Captain, if you had not gone ahead with your engine as you did and had remained in the position that you were when you first received the “Elder’s” whistle, what, in your judgment, would have happened?

A. Well, I believe he would have struck me a little aft.

Q. What makes you think that?

A. Well, judging from the way he was heading unless he had changed his course.

Q. Tell us about it.

A. Well, I had to look right aft from the “Kern’s” bridge and the “Elder” was coming right directly astern of me, a little the starboard quarter as near as I knew, but as near as I could judge pretty well astern and headed right for me.

Q. Will you state whether or not there was any change in the position of the “Elder” between the

(Testimony of Michael Moran.)

time that you gave your last four blast signal and the time that you rang full speed ahead?

A. Yes, she was then backing. The "Elder's" bow was swinging to port.

Q. When you say she was swinging to port, which way was the "Elder's" bow swinging with respect to the Oregon or Washington shore? [93]

A. She was swinging towards the Oregon shore.

Q. Captain, what lights, if any, did you have on your vessel?

A. We had two masthead lights, starboard green light and port red light, and a stern light up.

Q. Do you know whether or not they were burning prior to and up to the time of the collision?

A. Yes, sir, I am sure they were burning. Now, at the time of the collision I had a searchlight burning.

Q. What were you doing with it?

A. That was down on the barges. Pointed the light forward showing the men on the rock barges—light to get around—where to get their lines out.

Q. Which rock barge was it thrown on?

A. On the port rock barge. The port bow of the "Kern" was right ahead. That would be on the port barge, of course.

Q. Will you state whether or not at any time you threw it upstream of you on the "Elder"?

A. No, sir, at no time.

Q. Did you ever try the light to see whether it could be thrown astern or not? A. I never did.

Q. What reason, if any, Captain, did you have for

(Testimony of Michael Moran.)

responding to the one blast signal of the "Elder" with four short blasts?

A. Well, my reason was that I concluded there was nothing going to happen but a collision; that he was going to run right into me and I thought I would warn him of the danger he was approaching.

Q. Why did you think there was going to be a collision?

A. Well, I could see by his lights—judging the way he was heading by his signal lights—he was heading right for me all the time. Not making any attempt to alter his course that I could notice. [94]

Q. How soon did you see him after he blew his one whistle?

A. I saw him right away after I went outside—while I jumped out of the pilot-house and looked astern.

Q. At that time will you state whether or not he was swinging or whether or not his lights were stationary or how they were.

A. They seemed to me to be about steady. He seemed to be coming right head-on to me steady. I couldn't notice any change of his signal lights. If he was swinging I couldn't notice it.

Q. How was the room between you and the Washington shore?

A. There was considerable room there, anyway from twelve to thirteen hundred feet of room, as near as I could judge.

Q. In your judgment there was room sufficient for the "Elder" to pass down between you and the

(Testimony of Michael Moran.)

Washington shore? A. Yes, sir.

Q. How was the water?

A. Considerable good water up to within pretty close to the Washington shore.

Q. In view of these facts, why didn't you give him—respond with a one-whistle signal?

A. Well, I would have if he had shut out his green light. I would have given him the regular passing whistle, but he didn't make the attempt to do it, and I thought it was my place to give him the danger whistle; on account of laying still and the rock barges on my port bow, I couldn't comply with his whistle to go ahead on the starboard helm, was my reason for doing it.

Q. Will you state whether or not you had any control of your barges at that time?

A. I had no control whatever.

Mr. DENMAN.—Your Honor, these maneuvers took place, under our opponent's theory, under certain rules, and I think it might [95] be well for you to have a copy of that rule before you as the testimony is given, because the witness is testifying with reference to that rule.

COURT.—What is that rule?

Mr. DENMAN.—I mean to say unless one knows the rule, this would be unintelligible.

Mr. WOOD.—It is No. 8, you mean?

A. No. 2.

COURT.—Just read the rule.

Mr. FULTON.—He is required, if he wants to go to the right, to give one whistle. If the vessel to

(Testimony of Michael Moran.)

whom he signals is willing he should pass to the right, it responds with one whistle. If he wants to go to the left he gives two whistles, and if the other vessel is willing he should pass to the left, it gives two whistles, but if it gives what he calls the danger whistle, it means he must not pass; that there is danger.

Q. How did the width of the channel at this point compare with the average width of the channel for a distance of five miles up and down each side of it?

A. Oh, it was exceedingly wide there in that particular place, very wide.

Q. Will you state whether or not in your judgment there was room for the "Elder" to have passed between you and the Oregon shore?

A. Yes, sir, lots of room. There were several ships had passed.

Q. How was the water for the "Elder"?

A. Plenty of water.

Q. At the time that you heard the first whistle blown did you know what vessel it was?

A. I did not, sir.

Q. Did you know what was the customary danger signal used by vessels navigating the Columbia River? [96] A. Yes, sir.

Q. What is it?

A. Four short and rapid blasts of the whistle.

Q. Was there any time from the time that you first saw the "Elder" until after the collision that the lights of the "Elder" were shut out from you?

A. No, sir; no time.

Q. Did I ask you what in your judgment would

(Testimony of Michael Moran.)

have occurred, if anything, if you had not gone ahead on your engine at the time you did?

A. Well, to the best of my judgment I would either have run up into the stern of the "Elder," right clean through her.

Q. Of the "Elder?"

Mr. DENMAN.—Of the "Elder" or the "Kern"?

A. Of the "Kern" I should say—the "Elder" would have.

Q. Why did you go ahead?

A. I went ahead to avoid the collision, if I could possibly do it—to get from under his bows.

Cross-examination by Mr. DENMAN.

Q. Captain Moran, when did you first see these models?

A. The first time I saw them was to-day.

Q. When did you first talk this case over with Mr. Campbell? How long ago was it?

Mr. CAMPBELL.—I will admit he talked it over with me this morning when he left the courtroom.

Mr. DENMAN.—Now, that is just the admission I don't want.

Mr. FULTON.—It is that admission that means a suggestion.

Q. When did you first talk this case over with Mr. Campbell?

A. Well, I first talked the case over with Mr. Campbell I think [97] this morning or once before—once before, I guess.

Q. Once before; when was the once before?

(Testimony of Michael Moran.)

A. Well, I could not hardly say, but it was a couple of weeks ago.

Q. There was nothing wrong in that. That is entirely proper.

A. No. I will try to tell the truth about it, your Honor.

Q. You then went over all the details of this matter with him and explained the case?

A. We went down to the place where the accident occurred.

Q. Oh, I see; and you pointed out to Mr. Campbell just how these boats lay there in the place itself?

A. Yes, sir, as near as I could to him.

Q. As near as you could; and then after you explained that to Mr. Campbell he came back and had these models made; is that it?

A. I don't know when the models were made.

Q. I see; but the next time you met him you had the models and you sat down and went through these diagrams just as they have been drawn here, did you?

A. No, sir. I never saw the models until I saw them here to-day with Captain Crowe.

Q. Well, did you show the Captain how they lay with reference to the shore? A. No, sir.

Q. So, then, Mr. Campbell as he lay these out must have gotten any suggestions he got as to the positions from your trip with him down the river?

A. Yes, sir.

Q. And you described to him the vessels in these various positions here at that time?

The COURT.—You will have to speak out so the

(Testimony of Michael Moran.)

reporter [98] can hear you.

WITNESS.—All right, your Honor.

The COURT.—Nodding your head and shaking your head doesn't get into the record.

Q. And these exhibits 6 and 7 are, on your oath, a true description of the angle that these vessels lay in with reference to the Oregon and Washington shores at the times you have described?

A. Yes, as near as I can tell.

Q. Well, your recollection is very clear on it, isn't it?

A. Yes, it is pretty clear. I could not be expected to remember for three years.

Q. Now, when you first came and affixed this line to the three barges the "Daniel Kern" was pointing towards the Oregon and away from the Washington shore?

A. Heading downstream. You mean the first time?

Q. Yes. Come right here and we will look at this (referring to plat).

A. I want to see which of these exhibits it is. I don't know where they are on there (indicating).

Q. I think your exhibit is right. There is no question about that. I want to make certain of that.

A. That was the position when I first got the "Elder's" signal (referring to exhibit).

Q. There you are pointing to what, the "Daniel Kern"? A. Yes, sir.

Q. On the exhibit 6, and with a line attached to the port barge of the three barges; that is correct, isn't

(Testimony of Michael Moran.)

it? A. That is correct.

Q. At that time you were headed away from the Washington shore and towards the Oregon shore?

[99] A. Well, headed downstream.

Q. Well, towards the Oregon shore?

A. Well, the Oregon shore comes down (indicating). Yes, I would be heading down; I would not be heading towards the Oregon shore.

Q. Well, you drew it that way?

A. Well, we would not necessarily go down that way (indicating).

Mr. CAMPBELL.—If the Court please, you understand when I drew these lines of the Oregon and Washington shores I didn't attempt to outline the shore, but it was simply to show each side of the river.

The COURT.—I think I understand the conditions very well.

WITNESS.—I meant to say the "Kern" was heading downstream in the middle of the river, this side of the line of the Washington shore, right off Puget Island.

Q. Your position is now she was running right downstream?

A. Yes, sir; laying south of the barges, laying across the stream, as near as I could tell.

Q. As I understand, the line which fastened the "Daniel Kern" to the port barge was broken at the time of the collision?

A. Well, it was let go and broke partly at the same time, as near as I could tell,—as near as I remember.

(Testimony of Michael Moran.)

Q. At the time of the collision?

A. After the collision, after he struck us.

Q. After he struck you? A. Yes, sir.

Q. So it was fastened there at the time he struck you? A. Yes, sir.

Q. And as I understand it, you started your engines when the "Elder" was about twenty feet from you, twenty or twenty-five feet? [100]

A. Yes, sir.

Q. You are quite sure as to that?

A. Yes, quite sure.

Q. Then you were dead in the water at that time, weren't you? That is correct? A. Yes, sir.

Q. You were dead in the water at that time?

A. Yes, sir; up to the time I started the engine.

Q. Yes, and you were fastened to these barges?

A. Just had the line out.

Q. Had a line there, and your port side was against the after starboard corner of the barge; that is correct, isn't it?

A. Well, I might not have been against it exactly.

Q. You remember testifying you were against it, don't you? A. Not exactly against that.

Q. Now where were you?

A. If there was any at all there would not have been much distance, not a great deal of distance, a couple of feet probably if anything between them.

Q. All right; a couple of feet?

A. I don't know, because I could not see down there, you know, from where I was.

Q. All right. Now how far do you suppose you

(Testimony of Michael Moran.)

moved the "Daniel Kern" starting from dead in the water and tied to the port barge, between the time that you saw the "Elder" twenty-five feet off and the time she struck?

A. Oh, she probably moved twenty-five or thirty feet; I don't know for sure but judge she might move thirty or forty feet. She moved until that line came tight and that line held her there until the "Elder" struck her; then they parted and I sung [101] out to the mate to let her go and he did so; or, at least, he let her go without me signing out, in fact.

Q. So that the position of the "Daniel Kern" had altered very little then between the twenty-five feet that you saw the "Elder" off and the time she struck; there really was very little change in your position?

A. Very little, unless she swung around a little on account of the helm aport.

Q. A degree or a point?

A. Oh, I have no idea how much, but she swung some on account of the helm being aport and the engines dead ahead.

Q. She was dead in the water?

A. That would make a steam vessel move all the quicker astern.

Q. With the line holding her head to starboard?

A. Well, before that line came tight; I am telling you now that line was slack, you know.

Q. Your testimony was she had her line fast?

A. I had her line out. I said, and made fast.

(Testimony of Michael Moran.)

There was probably some slack in that line.

Q. How much slack was in it?

A. Oh, I suppose a small bit, probably a few feet.

Mr. FULTON.—How many?

A. Probably a few feet.

Q. Ten feet?

A. Maybe. Perhaps none at all, for all I know.

Q. About ten feet?

A. I know very well just getting the line out and taking a slight turn around the bitts there would not be any strain on them.

Q. You could not have gotten more than ten feet slack on the line, could you? [102]

A. Well, I have got no idea how many feet to the foot one way or the other, only I know very well the strain came on that with a jerk at the time I went ahead and held the ship right there to the barges and the barges swung this way (indicating) and went that way (indicating); and then when the "Elder" struck her of course she slued her stern down and it parted this line and the mate let her go at the same time he told me.

Q. As I understand it, when the collision occurred the barges were pointing about square upstream, according to that Exhibit No. 7; that is correct, isn't it?

A. Not at the time of the collision, you know.

Q. Not at the time of the collision?

A. Here is the way they were (indicating), right as this exhibit here shows.

Mr. CAMPBELL.—Referring to Exhibit 6.

(Testimony of Michael Moran.)

A. (Continuing.) This is the position right at the time the collision occurred.

Q. I see; Exhibit 6 shows the two at the time the collision occurred?

A. The barges heading for the Oregon shore.

Q. And you were pointing straight downstream?

A. Downstream as near as I could judge at the time.

Q. Now the exhibit you referred to was Exhibit No. 6 just now? A. This one (indicating).

Q. Yes. A. All right.

Q. Now, at the time you first saw the "Elder" coming down—by the way, who did you have on decks at that time? A. Had all hands on decks.

Q. Whereabouts? [103]

A. Only the chief engineer, on the poop, and the captain.

Q. Whereabouts?

A. All down forward on the deck; all down forward here working.

Q. All the seamen and everybody were down forward? A. Yes, mostly.

Q. Didn't have any lookout aft? A. No, sir.

Q. Sure of that? A. Sure.

Q. You had just taken hold of this line to back upstream, hadn't you?

A. Yes, sir, to pull the barges up that way to go in between.

Q. Why didn't you have a lookout aft if you were going to back upstream?

A. It is not customary to keep a lookout aft.

(Testimony of Michael Moran.)

That is the reason. We wasn't going to back any distance, only just going to give her a little kick back and swing the barges. Never keep any lookout aft on a ship that I know of.

Q. The reason, now, you didn't do more to help the "Elder" in this situation is because you were laying helpless to that barge, to those three barges, making up your tow; that is the reason, isn't it?

A. Yes, sir. But I didn't really think the "Elder" would come head-on to me until he hit me; because I know that there was room enough on each side for him to go if he wanted to after giving the danger signal, but he never changed his course one degree.

Q. I see; he never changed his course one degree?

A. Not as I could see; not by his signal lights, his lights blazing right at me there straight on.

Q. You were heading downstream you say when you first saw the "Elder"? [104]

A. She might have been a little towards the Washington shore, probably a little. I couldn't exactly see in the night there. I was interested in my work getting these barges lined up, and when the "Elder" came along I was interested in her actions. I had left the barges all to the crew.

Q. What is the value of all these drawings here if you don't recollect with reference to them?

A. I do recollect every one of them drawings.

Q. Well, what is your recollection now as to which way your vessel was pointing at the time?

A. I was heading downstream outside of the Washington shore, right straight downstream as

(Testimony of Michael Moran.)

near as I possibly know.

Q. All right. Then you saw the "Elder" coming downstream. Where was she when you first saw her?

A. When I first saw the "Elder" she was right astern.

Q. Right straight astern? A. Yes, sir.

Q. Was that the usual course for her to take?

A. Yes, sir; that was the usual course for her to go down that way.

Q. She was in the fairway then, was she?

A. Yes, she was in the fairway.

Q. By the way, you say that you had left the light barges well over on the Oregon shore; do you recollect that? A. Yes, sir.

Q. That wasn't a slip; that was a fact, was it?

A. That is the fact.

Q. What did you do that for?

A. Left them over there out of the way of vessels coming downstream in case there should be any.

Q. You think that is the proper way to do, do you?
[105]

A. I do that to help a man coming downstream more so than it is to help myself. It leaves them just safe.

Q. How does it help the man coming downstream, to have them out of his way?

A. They are not in his road in any way, shape or form; they are away out of his way and he don't have to bother about them. And they are safe to keep them from running down on them, if people

(Testimony of Michael Moran.)

should come down and make a practice of that.

Q. You think the proper way of handling these barges is to put them over out of the fairway so there would be no danger; that is correct, is it?

A. Yes, sir; that is my idea of doing it.

Q. By the way, who owns the "Hercules"?

A. The Columbia Contract Company, I guess.

Q. They were operating her?

A. Yes, sir; they were operating them.

Q. And the "Hercules" had left these three barges where they were found, had she not?

A. Yes, sir.

Q. That is, right in the middle of the fairway?

A. Well, right in the middle of the fairway. There was lots of room inside of her.

Q. Lots of room between her and the shore?

A. Lots of room on either side.

Q. As a matter of fact, that is the fairway close to that shore in running from this—let's go over to the chart here. The regular route of vessels up and down the Columbia River carries them over on this Washington shore, does it not?

A. Yes, sir; right down on the Washington shore. Right there where that collision occurred was about the fairway.

Q. The reason for that is because it is the shortest course, isn't it, coming around? [106]

A. This is Puget Island (indicating on chart).

Q. Coming from Puget Island?

A. Well, here is where we were.

Q. Well, just one moment. I will try to frame my

(Testimony of Michael Moran.)

question. From Puget Island around to Eagle Cliff the natural course is nearer in on that side, the fair-way, is it not, on the Washington side?

A. We cross over about here; Westport Slough here and Westport Light would be up here somewhere (indicating).

Q. I am not asking your course; I am asking the regular course.

A. That is the regular course.

Q. You say it is on the Washington side all the time?

A. Up here, yes, sir; where the accident happened.

Q. Where the accident happened?

A. Where the collision happened, yes, sir.

Q. Now how much water is there between the place where the collision happened and the Oregon shore?

A. Anywhere from sixty feet to three or four fathoms.

Q. And how much is the distance?

A. Well, I should judge it is a mile across there from one shore to the other.

Q. What is the distance, did you say, between the place of the collision and the Oregon or southern shore?

A. Well, I could not tell you exactly, but I guess it is a mile across there from shore to shore.

Q. A mile across there?

A. Approximately; it is a mile maybe.

Q. Where does the water begin to shoal off towards the Oregon shore?

(Testimony of Michael Moran.)

A. Well, you have got to go within a few hundred feet of the island before it gets shoal. [107]

Q. In other words, you had about a mile of clear water over there before it would shoal?

A. When I say a mile I mean from shore to shore.

Q. Now from the point where the collision occurred how far was it over there?

A. Well, you could go over there within four or five hundred feet of the Oregon shore and get thirty feet of water. At least, that is what I had some time previous to that, but I don't know the stage of the tide, whether the gauge was right, or whether high water or anything else, at that time.

Q. How much water does your boat, the "Kern," draw? A. Eleven or twelve feet.

Q. How much do the barges draw?

A. About ten loaded.

Q. About ten feet. So you had at least a half mile of water out of the fairway over on the Oregon side of sufficient draft for your vessels?

A. Yes, I think so.

Q. And in bringing down your light barges you had been careful to put your light barges out of the fairway so that they would not be in danger?

A. In bringing them up, you mean?

Q. In bringing them up; that is correct?

A. Yes.

Q. Now when you first saw the "Elder" how far did you say she was from you?

A. Well, I could not exactly say, but I should judge probably eight hundred or a thousand feet.

(Testimony of Michael Moran.)

Q. It was in the dark, wasn't it?

A. It was a dark night. It is all approximate.

Q. Might have been a couple of thousand feet, mightn't it? [108]

A. No, I don't think it was that far, judging from the way I had to go by, the masthead light. That is what I had to go by more than anything else; but still I could not say.

Q. How far was her masthead light above the water?

A. I don't know exactly. It is up on the masthead. It depends on the height of the "Elder's" hull and her mast.

Q. You don't know how high it is above the water?

A. No, sir.

Q. Then you were judging that distance—

A. (Interrupting.) By the masthead light. It looked to be pretty close to me, on account of appearing pretty high.

Q. It might have been a thousand or it might have been two thousand feet?

A. I was judging a thousand feet to be the farthest.

Q. Now at that time you say she was right behind you?

A. When I first saw her, yes, I had to look right aft.

Q. Now what did you do then?

A. What did the "Elder" do?

Q. What did you do when you first saw her?

A. Well, the first time I saw her I waited until I

(Testimony of Michael Moran.)

see whether he was altering his course or not, and he didn't appear to alter his course one particle by his signal lights, and I jumped in the pilot-house and give him four short blasts of the whistle in answer to his one whistle.

Q. Did he have to alter his course before you had given him your answering whistle?

A. Well, not necessarily.

Q. Now, as a matter of fact, the rule requires that you shall give him an answering whistle before he alters the course, doesn't it?

A. That is up to me, whether I think I am in danger of being [109] run down. It is up to me to sound the danger signal or up to me to judge whether there is any danger.

Q. Was there any danger between you and the Washington shore at this time?

A. And the Washington shore?

Q. Yes.

A. There was danger if I should comply with his whistle by going ahead, or anything. There was no danger whatever that I knew of.

Q. Is there anything in the rule which requires you to go ahead when he asks permission to pass to your starboard? A. No.

Q. There is nothing in the rule?

A. Not that I know of.

Q. So you would have complied with the rule by simply blowing one whistle and letting him go between you and the Washington shore?

A. Well, I guess their rules would not have—I

(Testimony of Michael Moran.)

don't believe I would have been doing anything wrong by doing it, either.

Q. Now, at the time you blew the four whistles indicating danger there was no danger between you and the Washington shore; that is, no sunken hulk, nothing of that kind there; the water was perfectly clear, a thousand feet of water between you and the Washington shore? A. Yes.

Q. That is correct, is it? A. Yes, sir.

Q. Now, you say a thousand feet, and he was directly behind you coming down about the center line of your ship?

A. Well, that is what it seemed to be, yes.

Q. And what is the beam of your vessel? [110]

A. I don't know exactly. What is the beam? Do you know the beam of the "Kern," Mr. Kern? May I ask that question?

Mr. KERN.—About twenty-six feet.

Q. About twenty-six feet, and half of that is thirteen feet, isn't it? A. Yes, sir.

Q. And he was coming right down, as near as you could see, about the center line of the vessel?

A. Yes, sir, I could not say exactly.

Q. So in a thousand feet, if he cleared thirteen feet towards the Washington shore—I am speaking now of the "Elder"—he would have cleared your vessel; that is correct, isn't it?

A. If he got thirteen feet to the Washington—well, he wouldn't have went clear of me because I had to go more than thirteen feet to come right alongside of him.

(Testimony of Michael Moran.)

Q. I mean to say if he had come thirteen feet in the thousand feet towards the Washington shore he would have cleared you; that is correct, isn't it?

A. If I understand you right, you mean one-half the width of the "Kern," thirteen feet?

Q. You say as near as you could say she was coming right down behind the line of the "Kern" and straight forward, as near as you could see, as far as the eye could judge? A. Yes.

Q. Of course, it is indefinite? A. Yes.

Q. She would have split her right even, if she had come on?

A. Pretty near it, yes, sir, as near as I could judge.

Q. And she was a thousand feet distance from you?

A. I don't know. I should judge she was pretty close, anyway.

Q. You say it might be a thousand feet or two thousand? [111]

A. Yes; at the speed the "Elder" was coming I consider that pretty close.

Q. Now, if the "Elder" had swung forty feet in that thousand she would have cleared you for certain, beyond any question?

A. Yes, sir; I think so.

Q. And yet you could, in two seconds, tell that he wasn't going to put his helm over and clear those forty feet; is that correct?

A. No, I could not tell what he was going to do; not that he hadn't lots of time to do lots of things there if he had done it, but he didn't indicate he was

(Testimony of Michael Moran.)

doing anything but what I saw. When he was heading right for me I thought it was well to indicate the danger he was approaching. That is what made me give the danger signals.

Q. He could see where you were, couldn't he?

A. He could see my light.

Q. He could see you that thousand feet away, couldn't he? A. Well, I don't know.

Q. Well, whatever the distance was?

A. I don't know.

Q. You admit that the one-whistle signal from the "Elder" was asking whether he could pass to your starboard or right; that is correct, isn't it?

A. Well, I suppose it was; yes.

Mr. CAMPBELL.—I submit, if the Court please, the rule provides what the one-whistle signal is for.

Mr. DENMAN.—You have asked his motives, and I want to follow them up. I want to show this man either didn't know the rules or violated them willingly.

Mr. FULTON.—He knew when a man gave one signal he wanted to pass to the right. [112]

The COURT.—One whistle was an indication that the vessel wanted to go to the right.

Mr. DENMAN.—Yes.

The COURT.—That is not controverted, is it?

Q. How long did you say you stood there before you made up your mind that the "Elder" was not going to swing over that twenty-five or thirty feet in the thousand?

A. Well, I should judge when I saw his lights I

(Testimony of Michael Moran.)

went in right away as quick as I could. I waited long enough while I was walking across the deck and I didn't see any change in his signal lights and he appeared to be getting pretty close to me and I jumped in the pilot-house and gave him the danger signals, as the rule says.

Q. You saw he was pretty close; what did you do then? When you jumped in the pilot-house and gave him the danger signal, then what did you do?

A. Then I came out again and watched him.

Q. Then you came out again and watched him?

A. Yes, sir.

Q. When you came out again where was he?

A. He was still heading in the same position, heading right for me.

Q. I thought you said he was on your starboard then? A. No, he wasn't.

Q. Still heading right for your stern?

A. Yes, sir.

Q. Is that it? A. Yes, sir.

Q. Would have still split you right in half, coming on? A. Yes.

Q. Now, that was after you had given the four whistle signal, wasn't it? [113]

A. Yes.

Q. And that four whistle signal indicated there was some danger, did it not? A. Yes, sir.

Q. And the only thing he could have done when he got the four whistle signal was to reverse his propeller, wasn't it?

A. Well, he could have went either way or backed

(Testimony of Michael Moran.)

up then. It is up to him to judge, according to my notion and according to the rules, too.

Q. You mean to say when you have blown four whistles indicating that there is danger ahead that he has got any other recourse than to stop his ship?

A. Well, the rules say he should stop and back up.

Q. All right. Then he was doing the right thing in stopping and backing up, wasn't he? Is that correct?

A. Yes, sir, I guess it is, according to the rules.

Q. All right. Now, let's get this in seconds. You heard one whistle? A. Yes.

Q. In two seconds you gave a four-whistle signal?

A. Well, near about that.

Q. Yes; and the only thing he could have done when he got that four-whistle signal was to back, under the rules?

A. Well, he could have went on either side of me if he wanted to.

Q. He could not, when you gave him the danger signal, have come on?

A. Well, the rules give him the privilege to depart from that, if he wants to.

Q. I know. As far as your four blasts would indicate they would indicate danger ahead, wouldn't they? [114]

A. Yes, sir; but the way he was coming at that time he could change his mind and go to either side of me.

Q. It would be his business, when you indicated

(Testimony of Michael Moran.)

there was danger ahead, to stop his vessel, would it not?

A. It would be his business, yes, to get his vessel under control.

Q. Now do you know whether or not she has a left-hand or right-hand propeller? A. How?

Q. Do you know whether she has a left-hand or right-hand propeller?

A. She has a left-hand propeller, the "Elder" has.

Q. What effect does that have upon her?

A. When she backs it throws her head to port and stern to starboard.

Q. That is, her head would leave the Oregon shore?

A. Yes, sir.

Q. So as she would go ahead under gradually diminishing speed it would curve from the Washington over to the Oregon shore; that is correct, is it not? A. Yes, sir, as far as I know.

Q. What is the weight of these three barges, loaded?

A. About three thousand tons, I guess; anywhere from twenty-eight hundred to three thousand tons.

Q. Twenty-eight hundred to three thousand tons—apiece? A. How?

Q. Each one?

A. No; the whole three of them.

Q. The whole three. That is a pretty clumsy contrivance to move, isn't it?

A. Yes, sir; it is not very easy to move them, not under the conditions. [115]

Q. And especially not easy to move before you get

(Testimony of Michael Moran.)

your nose into them and get them in shape?

A. You can't move them until you get in.

Q. So during all the time you are making her up she is pretty helpless? A. Yes, sir.

Q. You say it is now customary to go the whole way through with your barges; is that correct? You no longer swap in the middle of the stream?

A. Now?

Q. Yes.

A. I don't know what they do now. Not at that time it wasn't customary.

Q. Do you know what happened after that? Do you know whether they made any change in their method of handling the barges?

Mr. CAMPBELL.—If the Court please, we object to that as immaterial.

A. Just the same as the "Hercules," the "Samson" changes; it is just the same.

Q. They do now change just the same?

A. Yes, sir. But they have another boat now that tows right through.

Q. You say you haven't been with them since that time?

A. No. I don't know anything about what they do outside of changing tows.

Q. How is that?

A. They change tows just about the same as they always did.

Q. When did you leave the employ of these people?

A. Last March.

Q. They continued right on the same method after

(Testimony of Michael Moran.)

you left them? [116] A. Yes, sir.

Q. Exchanging these barges right in the fairway where the vessels are passing up and down; is that correct?

A. Yes; most of the time they do the best they can; at least we always did, to get out of the fairway.

Q. Get out of the fairway if you can?

A. Yes, sir; most of the time, wherever we can, wherever it is necessary to do it, wherever there is not plenty of room.

Q. Well, there was plenty of room clear to get out of the fairway, wasn't there?

A. Yes, sir, there was plenty of room for other vessels to get through the fairway, too. We were in such shape to that fairway as that they were safe.

Q. To make your idea clear, your idea was that it was safe for you to stay in the fairway—

A. (Interrupting.) Our idea is we had as good a right in that channel as any of them.

Q. To make up your tow? A. Yes, sir.

Q. Well, then, why did you take your barges over to this other portion?

A. We do that as a rule to help the people, keep them out of the way. We don't have to if we don't want to, as I understand the law.

Q. You think there is no rule against it?

A. There is no rule against me changing my tow on the river anywhere.

Q. You think it would be better and safer navigation to put it over?

A. Yes, sir. We do that to accommodate people

(Testimony of Michael Moran.)

that have to come in contact with those barges, as a rule. [117]

Q. When you stated then a while ago it was safer to do it over there, you didn't mean that?

A. Yes, sir; I meant it; I say we do it wherever it is practical to do so, but there is nothing compelling me to do it if I don't want to. There is no rules or laws compelling me to do that, that I know of.

Q. Now, you say that just before you started your engines when the "Elder" was about twenty feet from you, that she then had been swinging to starboard? A. To port.

Q. To port?

A. Yes; towards the Oregon shore.

Q. And after that you started your engines and went ahead?

A. After I was sure she was swinging that way I was safe then to go ahead.

Q. You didn't start your engines ahead until she was swinging? You were to be sure of that?

A. I was to be sure of that; yes, sir; that is the idea.

Q. You could see them quite a ways coming over from, away from her port; that is, swinging to her port for quite a little ways?

A. Well, about twenty-five feet, I should say, when I run the engine ahead.

Q. You saw them twenty-five feet away?

A. Yes.

Q. Prior to that time she had swung enough

(Testimony of Michael Moran.)

you could make up your mind she was swinging over towards port?

A. Yes, sir, she was swinging, swinging slowly.

Q. And that swinging over is what brought her now at this sharp angle into your vessel, is it not? That is correct, isn't it? [118] A. Yes, sir.

Q. That is why the stroke seems to be pretty near at right angles, isn't it?

A. And we were swinging at the same time, under a port helm.

Q. You could not have been swinging under a port helm if you didn't start until after that?

A. I started immediately as soon as I discovered he was swinging to port and towards the Oregon shore, I started my helm to port, which threw the "Kern's" stern around towards the Oregon shore and her bow towards the Washington shore.

Q. She was only twenty-five feet from you?

A. Well, as near as I could judge.

Q. And then you moved, to get into you at right angles, didn't you?

A. Well, I don't know as to that.

Q. Well, that angle shown there is the correct angle, isn't it (counsel referring to wooden model)?

A. Well, I guess it probably is.

Q. And you at that time were pointing her bow downstream? A. Yes, sir.

Q. I see by this Exhibit No. 7 that at the moment she struck you the three barges were pointed about up and downstream?

A. That was after she struck us.

(Testimony of Michael Moran.)

Q. That was after she struck you; how long after?

A. Oh, right away after she struck me why that forced the barges' sterns downstream.

Q. So after he struck you the barges were pointing straight upstream and you were laying parallel alongside of them and pointing downstream?

A. Well, partly, yes.

Q. Then you were pointing downstream and she continued to [119] push you around until you were at right angles across the stream?

A. Yes, sir; that is right.

Q. So that he struck you when you pointed downstream, then he pushed you around until you were across the stream at right angles? A. Yes.

Q. You pass a great many steamers going up and down that river, don't you?

A. Yes, a good many.

Q. And they are coming and going right along, aren't they? A. Yes.

Q. Did you pass another just before that?

A. Yes, sir.

Q. And there was, I suppose, just about as much business there in 1909 as there is now, wasn't there, on the river?

A. I believe there was—a little more, if anything.

Q. A little more. That is all.

Redirect Examination by Mr. CAMPBELL.

Q. Which of the two tugs let go of the barges first, Captain, the "Hercules" from the loaded barges or the "Kern" from the light barges?

A. The "Kern" from the light barges.

(Testimony of Michael Moran.)

Q. What was your custom with respect to that?

A. Well, the custom is for the "Hercules" to stay with the loaded barges until we get down there right close to the loaded barges.

Q. How far away from the loaded barges did you get when you were going down?

A. Just about a little more than—she just had backed out [120] and turned around. She was right close to the loaded barges heading upstream when we got down, just had backed out in order to let me go in there.

Questions by the COURT:

Q. These barges were not anchored in any way at all, the loaded barges? A. No, your Honor.

Q. How long had you been pursuing that custom, exchanging the barges in the middle of the stream, or in the fairway?

A. Well, I had been doing that some time. I began in April, the first of April, or the fourth of April, I believe we started to work, and we had continued that up to that time.

Q. I understand then that the one boat having the charge of the barges going down and the other boat having the charge of the barges coming up, simply unloosed from the barges and let them swing in the stream? A. Yes, sir.

Q. Let them drift in the stream?

A. It leaves them right there and exchanges tows.

Q. And if the current is running out—for instance, at the time of the accident if the current had been

(Testimony of Michael Moran.)

Q. That was after she struck you; how long after?

A. Oh, right away after she struck me why that forced the barges' sterns downstream.

Q. So after he struck you the barges were pointing straight upstream and you were laying parallel alongside of them and pointing downstream?

A. Well, partly, yes.

Q. Then you were pointing downstream and she continued to [119] push you around until you were at right angles across the stream?

A. Yes, sir; that is right.

Q. So that he struck you when you pointed downstream, then he pushed you around until you were across the stream at right angles? A. Yes.

Q. You pass a great many steamers going up and down that river, don't you?

A. Yes, a good many.

Q. And they are coming and going right along, aren't they? A. Yes.

Q. Did you pass another just before that?

A. Yes, sir.

Q. And there was, I suppose, just about as much business there in 1909 as there is now, wasn't there, on the river?

A. I believe there was—a little more, if anything.

Q. A little more. That is all.

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Q. Which of the two tugs let go of the barges first, Captain, the "Hercules" from the loaded barges or the "Kern" from the light barges?

A. The "Kern" from the light barges.

(Testimony of Michael Moran.)

Q. What was your custom with respect to that?

A. Well, the custom is for the "Hercules" to stay with the loaded barges until we get down there right close to the loaded barges.

Q. How far away from the loaded barges did you get when you were going down?

A. Just about a little more than—she just had backed out [120] and turned around. She was right close to the loaded barges heading upstream when we got down, just had backed out in order to let me go in there.

Questions by the COURT:

Q. These barges were not anchored in any way at all, the loaded barges? A. No, your Honor.

Q. How long had you been pursuing that custom, exchanging the barges in the middle of the stream, or in the fairway?

A. Well, I had been doing that some time. I began in April, the first of April, or the fourth of April, I believe we started to work, and we had continued that up to that time.

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Q. Let them drift in the stream?

A. It leaves them right there and exchanges tows.

Q. And if the current is running out—for instance, at the time of the accident if the current had been

(Testimony of Michael Moran.)

running out it would have been carrying the barges downstream?

A. Well, the other boat generally brings them to a standstill until the boat that has the light barges gets down there, or as close as it is possible to get to them and give him room to get out from between them.

Q. How long does it take you to make fast to a barge?

A. Well, it depends on how quick the men works. If you have got men that is used to it, we have changed at times in five minutes, from five to ten minutes. [121]

Q. You do all of that in five to ten minutes?

A. What I mean now, your Honor, is we make fast; from the time we get to the barges until we are under way going downstream, under control; we have control of the tow anyway from five to ten minutes.

Q. Of course, while you are loose from the barges you have no control of the tow at all? A. No.

Q. Then you have to pick it up as quick as you can with the barges loose in the stream?

A. Yes.

Q. Do you consider that a safe practice, to leave those barges in the fairway?

A. Well, they are pretty well lighted up, you know. Men has got lights on them. There is a man on each barge with three lights,—on the stern and a light on each outside barge forward.

Q. Well, I am asking you for your opinion; do you

(Testimony of Michael Moran.)

consider that a safe proposition?

A. Yes, sir; I can't consider anything wrong about it. I had been doing it for years before that.

Q. When I ask you about a safe proposition, I have reference—

A. (Interrupting.) To my own opinion.

Q. (Continued.) —to yourself as well as passing boats? A. Yes, sir.

Q. Was it safe for passing boats?

A. Yes, sir, I considered it perfectly safe, as long as the men could see the lights on them. [122]

Recross-examination by Mr. DENMAN.

Q. Mr. Moran, what was the condition of the tide at that time? A. How?

Q. What was the condition of the tide at that time? Was there any current?

A. It was about low water, slack; probably the first of the flood.

The COURT.—He answered that before.

Q. Don't you recollect testifying before the Inspectors that the water was dead?

A. Well, slack water, yes; low water, slack; that is what I mean; it would be dead water.

Q. And that the water was practically immovable at that time?

A. Practically still; might have been on the turn coming up, if anything.

Q. Might have been on the turn coming up?

A. Yes, sir.

Q. So there is no reason why you could not have

(Testimony of Michael Moran.)

put these a half mile over to the Oregon shore at that time?

A. It was never necessary; never was practical to do it before.

Q. Why, it is perfectly easy to go over there, isn't it?
A. How?

Q. It is perfectly easy to go over there, isn't it, to steam over there?

A. Yes, you can do it if you want to.

Q. And you did put the light barges out of the fairway?

A. That is the custom. Coming up the light barges always passed to the starboard side and the ones coming down to the starboard side going down there, on that side of the channel.

Q. In other words, you want to get them out of the way for the passage of your own vessels? [123]

A. Yes, sir.

Q. But as far as other vessels are concerned you think you had a right to be right in the fairway; that is correct?

A. No; we had a perfect right to be there either for our own vessels or other vessels, so far as the rules and laws that I know of. We have the same right in the fairway as anybody else.

Q. You say they have been doing that for some years. You mean by that the Columbia Contract Company have been doing it?

A. Yes, sir; the same people, and other people as well as them make up tows and log rafts in the channel and lots of things.

(Testimony of Michael Moran.)

Q. Make up log rafts in the channel?

A. Yes, sir; if it is necessary.

Q. Is it ever necessary to make up a log raft in the channel? A. Sometimes they break adrift.

Q. I am talking about making up in the channel?

A. Oh, no.

Q. So the only people who use the channel for making up tows and contrivances of this kind are your Company; that is correct, isn't it?

A. Well, that is all I know of. I guess other companies could do the same, if it is necessary; but I don't know of any that does do it.

(Witness excused.) [124]

Testimony of Arthur Nissen, for Libelant.

ARTHUR NISSEN was called as a witness on behalf of libelant, and having been first duly sworn, testified as follows:

Direct Examination by Mr. CAMPBELL.

Mr. CAMPBELL.—I want to call this witness a little bit out of order, if the Court please, from the fact that he wants to get back down the river to his home.

Q. How old are you, Mr. Nissen?

A. Twenty-four years.

Q. Do you recall the evening or night of the collision between the "Elder" and the "Kern"?

A. Yes, sir.

Q. What business were you engaged in at that time? A. Fishing.

Q. What kind of fishing?

A. Salmon fishing.

(Testimony of Arthur Nissen.)

Q. Where were you at the time of the collision?

A. Well, I was about abreast of the Eureka cannery.

Q. Can you locate the Eureka cannery upon this chart?

A. Yes, sir; if it is there. (Witness looks at chart.) This is Eureka cannery here, of course, where it should be (indicating).

Q. Marked Eureka Packing Company, upon Exhibit 5? A. Yes, sir.

Q. Have you any recollection of the collision itself?

A. Well, only what I heard; that is all; just the signals.

Q. Where were you at the time of the collision?

A. I was abreast of the Eureka cannery.

Q. How far on the stream? [125]

A. Well, I should judge a mile out from shore, about in the middle of the river.

Q. Had you seen the "Elder" pass down?

A. Yes, sir.

Q. How close to you did she pass?

A. Well, I could not tell you exactly.

Q. Did you see the tugs "Hercules" and "Daniel Kern"? A. Yes, sir.

Q. Could you see the tugs themselves or just the lights?

A. Well, I could see the lights. When they passed me there I could see the tugs too.

Q. Did the tugs ever pass by you?

A. Which tug do you mean?

(Testimony of Arthur Nissen.)

Q. The "Kern." Where were you with respect to the "Kern"?

Mr. DENMAN.—Upstream or down?

A. Well, I was more out. I was out in the river, you see, and she passed down the river inside of me.

Q. Which did? A. The "Kern."

Q. Then you were upstream from the collision?

A. Yes, sir.

Q. Which steamer do you refer to as the "Kern"?

A. The one that had the loaded barges, the one that came up close.

Q. Whereabouts did the collision take place?

A. Well, it was right abreast of Hapgood's Light.

Q. What do you call the Hapgood Light?

A. The Government light just above Waterford Cannery. It is known as the Hapgood Light by the fishermen.

Q. Is it known by any other name?

A. I never heard any other name for it, no. [126]

Q. How far above the Waterford Cannery?

A. Well, it may be a quarter of a mile. I could not tell exactly.

Q. Did you hear any whistles exchanged between these vessels? A. Yes, sir.

Q. What did you hear?

Mr. DENMAN.—Now, between what vessels do you mean?

A. The "Elder" and the "Kern." Isn't that what you mean?

Q. Yes.

A. I heard the "Elder" blow one whistle; the

(Testimony of Arthur Nissen.)

“Kern” answered with four and the “Elder” blew one whistle again and the “Kern” answered with four.

Q. How long an interval elapsed between the various whistles? A. Well, probably a half a minute.

Q. How did you know a collision had taken place, if you did know?

A. I heard it and I could see the “Kern’s” lights. They all disappeared, so I knew that she sunk.

Q. What kind of a night was it?

A. It was a bright starlight night.

Q. How was the wind? A. There was no wind.

Q. How was the current or tide in the river at that time?

A. Well, I think it was most slack, almost to a stand; it might have been going down just a little.

Q. What were you doing at the time that you heard the whistle?

A. Well, I was drifting with my net in the boat.

Q. What?

A. I was drifting with my boat out in the river.

Q. Did you have your nets out?

A. No; I had my net in the boat. [127]

Q. Why didn’t you have your net out?

A. Well, there were so many steamers around there that I picked up. I was afraid they would run through it, and then I was waiting for them to get by before I laid it out again.

Cross-examination by Mr. DENMAN.

Q. How old are you? A. Twenty-four years.

Q. You are now twenty-four years of age?

(Testimony of Arthur Nissen.)

A. Yes, sir.

Q. How long had you been fishing that night?

A. Well, I had been fishing since about eight o'clock.

Q. How many steamers did you see that night? You say you saw a lot; how many were there?

A. Well, at that time there was—let's see; well, I think there was five.

Q. Five steamers; that is, within about a quarter of an hour?

A. Well, yes. Might have been a half an hour between the time I saw the first one until I saw the last one.

Q. What were the names of those steamers?

A. Well, there was the "Elder," the "Kern," and the "Samson" and the "Hercules" was four, and then there was another boat on the other side of the river with a raft; I don't know what the name of that one was.

Q. She had what? A. She had a raft in tow.

Q. What whistles did you hear from the "Hercules"? A. She blew one whistle.

Q. When was this?

A. This was before the collision. [128]

Q. How long before?

A. Well, I don't know just how long it was; it could not have been very long.

Q. And how many more did she blow after that? When did she blow her next whistle?

A. That is the only one I heard her blow, just one whistle, that I remember of. She blew one whistle

(Testimony of Arthur Nissen.)

to pass this "Geo. W. Elder."

Q. Now, then, how many whistles did the "Elder" blow then? A. She blew one.

Q. She blew one. How long was that before the collision? I am testing your memory now as to the events of that night.

A. I don't think it was over—not over fifteen minutes.

Q. Well, now, as a matter of fact, will you swear it was not a half an hour?

A. Yes, sir, I can swear it wasn't a half an hour.

Q. Will you swear it wasn't twenty-five minutes?

A. Well, yes, I can, because I know just about how far she had to go.

Q. Well, how much was it? How many minutes was it?

A. Well, I can't tell exactly, but I am positive it could not have been twenty-five minutes. I would not say any less than that.

Q. I see; then it was about twenty-five minutes? It wasn't over that?

A. Not over that. That is not in my mind now, because I know about the distance she went. Of course, right after that time I might have remembered it better.

Q. Well, of course, there was nothing up to the time of the collision that would lead you to watch these whistles, was [129] there, up to the time of the collision?

A. Well, yes; I always kept myself pretty well posted on whistles.

(Testimony of Arthur Nissen.)

Q. How about the night before that? What whistles did you hear then?

A. Well, I don't remember that. I can't remember every whistle I hear every night in the world.

Q. Well, then, I am asking you; you say you keep yourself well posted as to whistles; there was nothing up to the time of the collision that led you to watch these various whistles, was there?

A. Well, no, not exactly, any more than just keeping myself posted on whistles; that was all.

Q. Now, how soon after the collision did you discover there had been one? How long after it was it you discovered it?

A. Well, I discovered it the next morning at daylight, but I knew there, I was positive at the time when it was sinking what happened, because I could see her going down; that is, I could see the lights going out of sight.

Q. That was about fifteen minutes after this exchange of whistles that she went down?

A. Which whistles do you mean? I heard so many there.

Q. I am now speaking of the whistles that you spoke of as having been exchanged between the "Elder" and the "Kern," and about fifteen or twenty minutes after that—

A. (Interrupting.) Not more than that; no.

Q. So it wasn't until fifteen or twenty minutes after those whistles transpired that there was any reason for you to notice the whistles; that is correct, isn't it? A. No, it is not. [130]

(Testimony of Arthur Nissen.)

Q. Now, what was the reason that you noticed the whistles and remembered them so distinctly three years ago?

A. Well, I remembered them because there was a collision that night. That is the reason I remembered the whistles.

Q. But you didn't know there was a collision until fifteen minutes after those whistles were exchanged. Now, how did they come to be impressed in your memory?

A. Well, I say I knew there was a collision right after it happened, because I saw the lights going out of sight. Then of course I knew it sure the next morning, because I was down there and saw it, saw her mast sticking up.

Q. That was how long ago? How long ago was that?

A. That was two years ago. It was the eighteenth of August.

Q. 1909? A. 1909.

Q. So to make certain of it the next morning you went down and saw the mast sticking out of the water. You were not certain of it until you saw those masts there?

A. Well, of course, I knew for sure then all right, but then I was pretty sure of it afterward.

Q. What sort of a boat did you have?

A. I had a gasoline fishing-boat.

Q. How far were you away from this thing?

A. Well, not over a mile and a half.

Q. Might have been a mile from it?

(Testimony of Arthur Nissen.)

A. Well, it might have been a mile; not further than a mile and a half.

Q. Do you mean to say there was a collision in that river and you knew there was a collision and you saw the lights of the vessel sinking and you didn't go over there? A. Yes, sir. [131]

Redirect Examination by Mr. CAMPBELL.

Q. Did you hear any noises around there that night? A. Yes, sir.

Q. What noise?

A. I heard the "Elder" when she struck the "Kern." I heard that crash.

Q. What reason did you have for not going down there?

A. Well, what business would I have there? I had no business down there. I had business of my own to attend to up there. I was fishing. I knew I could not get there in time to help anyone.

Q. How long would it have taken you to have got down there?

A. Well, it might have taken me fifteen minutes.

Q. Did you see the "Hercules" going down?

A. Yes, sir.

(Witness excused.) [132]

Testimony of J. E. Copeland, for Libelant.

J. E. COPELAND was next called as a witness on behalf of the libelant, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. How old are you, Captain?

(Testimony of J. E. Copeland.)

A. I am forty-six.

Q. Where do you live?

A. I live at 253 East Hancock Street.

Q. Portland? A. Yes, sir.

Q. Do you hold a master's license? A. I do.

Q. How long have you held it?

A. Twenty years.

Q. For what class of vessels?

A. For river vessels.

Q. Upon what rivers?

A. On the Columbia River and its tributaries.

Q. Were you aboard of the steamer "Daniel Kern" on the night of August 18th, 1909, when she was run into by the "Elder"? A. I was.

Q. In what capacity? A. As master.

Q. Where were you at the time of the collision?

A. I was in the pilot-house at the time of the collision.

Q. Were you in command of the "Kern" at the time?

A. Well, I was in command of the "Kern"; yes, sir.

Q. Well, were you in charge of her navigation?

A. I wasn't in charge of her navigation; no, sir.

Q. How long before the collision had you turned the vessel, [133] if you had done so, to someone else?

A. Not to exceed twenty-five minutes, I don't think.

Q. To whom did you turn her over?

A. To Captain Moran, pilot.

(Testimony of J. E. Copeland.)

Q. What time was that?

A. About ten minutes past twelve, between ten and fifteen minutes.

Q. And where was the "Kern" at that time?

A. She was at what we call Cape Horn, just below Waterford, Washington.

Q. What doing?

A. She was coming upstream with three empty barges.

Q. What did you do after you turned her over to Moran?

A. I walked about the deck for a few moments and talked to Captain Moran and then went into my room.

Q. Where was your room located?

A. Immediately aft the pilot-house.

Q. Can you show me from this photograph (exhibiting Libellant's Exhibit 1 to witness)?

A. Yes, sir. This room right here behind the pilot-house where those two windows are.

Q. The room immediately below the name sign on the tug? A. Yes, sir.

Q. What are the two black spots?

A. Those are windows in the room.

Q. Where was the "Kern" at the time that you retired to your room?

A. She was just abreast Waterford dock.

Q. How did you get into your room?

A. I don't remember really. I think I went around the pilot-house [134] and came into the room aft on the after side where there was a door.

(Testimony of J. E. Copeland.)

Q. What doors did your room have?

A. Had a door on the after side opening out on the deck and another door from the inside opening into the pilot-house.

Q. Where did the door on the after side open with respect to the smokestack?

A. Just forward of the smokestack.

Q. Just forward of the smokestack, and where was the door in the forward part of the room?

A. It is on the port side of the pilot-house, rather on the port side of the pilot-house and opened directly into the port side of the pilot-house.

Q. Now, what did you do upon retiring to your room?

A. I turned the light on and sat down at the table and wrote up the log-book for the day's work before I retired.

Q. Then what did you do?

A. I turned the light out and about that time we met the "Eureka" and I stuck my head out of the window and asked the pilot what vessel that was, and he said it was the "Eureka," and as she passed by I noticed she was the "Eureka." I had my head out the window.

Q. On which side did she pass you?

A. On the port side.

Q. Between you and which side?

A. Between us and the Washington shore.

Q. Where were you at that time?

A. I was in the room.

Q. I know, but where was the "Kern"? [135]

(Testimony of J. E. Copeland.)

A. Well, she was between Waterford Cannery and Waterford Light, right along close there.

Q. Now, what was the first intimation that you had of the approach of the "Elder"?

A. When I heard her one whistle.

Q. Where were you at that time?

A. I had just laid down in my bed at that time.

Q. Were you awake or asleep? A. I was awake.

Q. Did you hear any signals exchanged between the "Elder" and the "Kern"? A. Yes, sir.

Q. What signals?

A. I heard the "Elder" blow one whistle and the "Kern" immediately blew four.

Q. How long a space of time elapsed between the two?

A. Well, a very short space of time. Almost immediately as soon as the pilot could blow the four whistles he blew them.

Q. Then what happened next?

A. Then I heard the "Elder" blow one whistle again.

Q. How long after the four whistles?

A. Almost immediately.

Q. And what happened then?

A. The "Kern" blew four whistles again.

Q. How long was that after the "Elder" had blown her second one whistle? How long was the second four whistles blown after the second one whistle of the "Elder"?

A. Almost immediately after the one whistle was blown from the "Elder."

(Testimony of J. E. Copeland.)

Q. What did you do when you heard the first whistle from the "Elder"? [136]

A. Well, I raised up in bed; I didn't go out, but the pilot called to me and says, "You had better get out, Captain; I think she is going to run us down"; and I began to get out of bed at that time.

Q. Then what did you do next?

A. I was on the floor of my room when he blew the four whistles the last time, and I went into the pilot-house.

Q. How did you get into the pilot-house?

A. I went into the pilot-house from the inside door, the door that opens into the pilot-house from my room.

Q. Had you had a view of the "Elder" prior to the time of going into the pilot-house? A. No, sir.

Q. What did you do after you got in the pilot-house?

A. I looked out the starboard side, the starboard door of the pilot-house and saw the "Elder" coming astern of us.

Q. What was the position of the "Elder" at that time?

A. She was headed right for us. I could see all three of her lights burning.

Q. Just describe, if you can, a little more the position of the "Elder" as you saw her then.

A. The "Elder," as I saw her then, was heading it looked to me almost 'midships, coming down past the stern of the steamer; of course, down past the stern of our steamer, but headed almost 'midships,

(Testimony of J. E. Copeland.)

and maybe a little half of 'midships I could see all of her lights, two sidelights and her mast light, very distinctly.

Q. What did you do after you looked out of the pilot-house door?

A. I turned to the wheel, put my hand on the wheel and undertook [137] to put it over, but I found it was already hard over and lashed.

Q. When you looked out of the pilot-house door, on the starboard side, I understood? A. Yes, sir.

Q. Which way did you have to turn your head to see the "Elder"?

A. Aft, right almost back over the stern of the steamer.

Q. And what did you do after you attempted to shift the helm?

A. Well, about that time the "Elder" struck the "Kern" and threw me down in the pilot-house.

Q. What was the "Kern" doing, if anything, at the time she was struck?

A. We were making fast to four loaded barges—to three loaded barges.

Q. Fast to three loaded barges?

A. We were making an attempt to make fast to three; yes.

Q. Did you see the position of the "Kern" with respect to the barges prior to the collision?

A. I don't think I noticed the position of the "Kern" to the barges prior to the collision, because I looked on the starboard side and the barges were on the port side or under the port bow, rather.

(Testimony of J. E. Copeland.)

Q. What was the "Kern" herself doing besides making fast to the barges, if anything, at the time of the collision?

A. I had heard the pilot ring for full steam ahead and she was at that time working ahead.

Q. Where were you at the time that the bell was rung full speed ahead?

A. I was just stepping from my room into the pilot-house.

Q. And do you know whether or not she moved ahead? [138]

A. Probably moved ahead thirty or forty feet, not to exceed that.

Q. What is your judgment about the distance she moved?

A. I would not think she moved over forty feet.

Q. Did she swing any?

A. Her stern swung downstream, yes.

Q. Which way do you mean, downstream?

A. Well, her stern swung to port.

Q. Which way would that be with respect to the respective shores?

A. That would be swinging away from the Washington shore.

Q. Where would it be swinging with respect to the "Elder?" A. Swinging away from the "Elder."

Q. Captain, if the helm had been put hard astarboard and the engine had been worked full speed ahead, in your judgment could the "Kern" have gotten out of the way of the "Elder"?

A. I don't think she would at the time that I saw

(Testimony of J. E. Copeland.)

them there; they were too close. She could not possibly have gotten out of her way; that is my judgment.

Q. How soon did you see them after the last four whistles were blown?

A. Well, it could not have been more than a few seconds, because just as the four whistles were blown he gave a bell to go ahead, and that was at the time I was stepping in the pilot-house and I immediately went to the starboard side, looked aft and saw the "Elder."

Q. How far aft would you think the "Elder" was away at that time?

A. I would not think she was over forty feet.

Q. What lights could you see on her?

A. On the "Elder"?

Q. Yes.

A. I could see her green and red light and mast light, bright mast light. [139]

Q. Did you see your searchlight at that time?

A. Yes, sir.

Q. Was it in use?

A. It was. It was shining on the barges forward.

Q. It was where?

A. Shining on the barges forward, right off on the port, just a little on the port bow of the "Kern."

Q. Did you see the searchlight after it was raised?

A. After the boat was raised; yes, sir.

Q. How was the searchlight when it was raised with respect to the position it was in when shining on the port barge?

(Testimony of J. E. Copeland.)

A. It didn't look to me as if it had moved a particle.

Q. Where were you at the time the "Elder" was brought to the surface?

A. At the time the "Kern" was brought to the surface?

Q. At the time the "Kern" was brought to the surface?

A. I was there helping to raise her.

Mr. DENMAN.—By the way, have you the photographs of the cut into her?

Mr. CAMPBELL.—I think so.

Q. I will hand you that photograph, Captain, and ask you whether or not that correctly shows the position of the searchlight at the time that the "Kern" was raised? A. Yes, sir.

Q. And which way is it pointing?

A. It is pointing just a little over the port bow, past the forward mast here, just as it was she was lit the night she sunk.

Mr. CAMPBELL.—The answer charges as a defense that the searchlight was being thrown in the face of the pilot on the "Elder." That is the reason I am going into that question. I will offer this in evidence. [140]

(Thereupon said photograph was received in evidence on behalf of the libelant and marked Libelant's Exhibit 8.)

Q. What kind of a night was it, Captain?

A. It was a clear night.

Q. How was the wind.

(Testimony of J. E. Copeland.)

A. There was no wind; that is, there was none to speak of at all. There might have been a very little breeze, probably was,—nearly always is on the river at that time.

Q. How was the current in the river?

A. There was no current. It was slack water.

Q. Did the “Kern” leave the empty barges?

A. Yes, sir.

Q. Where did she leave them?

A. She left them just above what is known as Cooper’s Point light.

Q. And where did the “Hercules” leave the loaded barges?

A. She left the loads in front of the Waterford Light.

Q. And how far offshore of the Waterford Light?

A. Well, as nearly as I can guess at it, about between six and eight hundred feet.

Q. How long had you been master of the “Kern,” Captain?

A. I think I had been master of her about two years at that time.

Q. How long had you been engaged in towing those barges upon the river?

A. About four years altogether.

Q. What was your custom with respect to exchanging barges, tugs exchanging loaded for light barges and light for loaded barges?

A. In meeting the “Hercules,” which would bring the loads down the river, we would turn the empty ones adrift, the “Hercules” would hold on to the

(Testimony of J. E. Copeland.)

loads until we got turned around and down [141] almost to her, and then she would get out from between them; she would back up in order to take the headway off, so they would not drift, and she would back out and we would go in between the barges.

Q. And what, if any, was the customary place on the river where the tugs exchanged barges?

A. There really was no customary place. We always went until we met, but we usually met between Oak Point and Waterford, somewhere along in that vicinity.

Q. Between what point?

A. Oak Point and Waterford.

Q. And how far above Eureka Cannery would you say Oak Point is?

A. About two miles above Eureka Cannery, I think it is.

Q. And where with respect to Grim's Island?

A. Grim's Island?

Q. Yes.

A. Oak Point is just at the lower point of Grim's Island.

Q. Will you see if it is marked on the chart which is on the board? No; it is the hydrographic chart.

A. This is Puget Island here (indicating). It is down further.

Q. Here it is (indicating).

A. Oak Point would be right across here. That would be the Washington side, wouldn't it (indicating)?

Q. Yes.

(Testimony of J. E. Copeland.)

A. That would be right across there from Grim's Island.

Q. On the Washington shore about opposite Grim's Island?

A. The lower end of Grim's Island, yes, sir.

Mr. FULTON.—What is that, the lower end?

A. Yes, sir, opposite the lower end. It might be a little below the lower end of Grim's Island. [142]

Q. How long had you been exchanging barges on the river that way?

A. I think it was four years. I went to work on the "Samson" first for Mr. Kern, or for the Columbia Contract Company, who ran the "Samson"; was on the "Samson" one year, and then I was on the "Hercules"—I think four years.

Q. Did the "Kern" have any lights burning at that time? A. Yes, sir.

Q. What lights?

A. She had her two sidelights which were red and green; the green on the starboard and the red on the port. She had the mast light burning, and a bright light burning on the after side of her deck-house, or house aft on the upper deck.

Q. Was there any screening on the sidelights?

A. Yes, sir; there was regulation screens.

Q. How were they screened?

A. They were screened so as not to—so as one light won't *through* the light across the bow. The screens run three feet forward from the light and then there is a board on the after side of the light.

Q. Had the vessel passed inspection by the Gov-

(Testimony of J. E. Copeland.)

ernment Inspectors? A. Yes, sir.

Q. Had any change been made in the screens upon orders by the Government Inspectors?

A. No, sir, not to my knowledge.

Q. Now, Captain, after the "Elder" struck the "Kern," or, rather, just where did the "Elder" strike the "Kern"?

A. She struck her on the starboard quarter aft about sixteen feet from the after end of the "Kern," measuring from the inside of the—measuring from directly over the stern post sixteen feet forward.
[143]

Q. Where did she strike with respect to the house which is shown on the upper deck of the "Kern"?

A. She struck her just so as to run right into the after end of that house.

Q. That is, the house on the upper deck?

A. Yes, sir, the house on the upper deck.

Q. What effect did the collision have upon the "Kern"?

A. Well, it had the effect that it slued her around against the barges; she was lying alongside of them; it threw the "Kern" right around so that she lay right alongside of the barges.

Q. Which way was she headed? What way did it leave her heading?

A. It left her headed almost directly for the Washington shore.

Q. And what became of the barges?

A. The barges, two of them laid in the stream and

(Testimony of J. E. Copeland.)

the third one broke loose and drifted over against the Washington shore.

Q. Well, what did you do after the collision, after she struck the "Kern"?

A. I got off upon the barges.

Q. Which barge?

A. Off on the port barge; that is, it was the port barge of the two. It was the port barge that broke loose and drifted over to the Washington shore.

Q. And where was the port barge when you jumped aboard of it?

A. Laying right alongside of the "Kern," right along the port side of the "Kern."

Q. Speak a little louder, if you can.

A. Right on the port side of the "Kern."

Q. And from what part of the "Kern" did you get aboard of the barge?

A. From the forward part. [144]

Q. What do you mean by from the forward part?

A. From what is known as the forward gangway.

Q. Can you show us on Exhibit 1, the photograph?

A. Yes, sir. The gangway is right here (indicating).

Q. Where was the part with respect to the pilot-house? A. Forward of the pilot-house.

Q. On which deck? A. On the main deck.

Q. How far forward of the pilot-house?

A. Well, it is about, oh, twenty feet, I should judge. There is a pair of stairs that comes right down there. I came down those stairs and stepped off on the port side through this gangway.

(Testimony of J. E. Copeland.)

Q. How did the point at which you stepped off compare with the position of the main mast or the foremast?

A. On the port side and forward of the foremast.

Q. How far from the foremast?

A. Well, it is about fifteen feet, I suppose; nearly fifteen feet over forward of the foremast.

Q. Which end of the port barge did you step off on?

A. I stepped on the after end of the port barge.

Q. How long, in your judgment, did the "Elder" hang on to the "Kern," the point where she struck her?

A. Well, not over two or three minutes, I don't think.

Q. What was it that caused the "Elder" to swing around in position so she was headed towards the Washington shore?

A. You mean the "Kern" swing around?

Q. The "Kern."

A. The "Elder" striking her would naturally swing her around, so that she would head across the river. [145]

Q. Did the engine continue to work, Captain?

A. No, sir.

Q. I am referring to the "Kern's" engine, of course. Did the "Kern's" engine continue working?

A. No, sir; it was shut off before I got out of the pilot-house.

Mr. DENMAN.—How long did it work, Captain?

A. How long did it work?

(Testimony of J. E. Copeland.)

Mr. DENMAN.—Yes.

A. Oh, I suppose it worked maybe a minute, maybe not so long. It was pretty hard to tell just how long it did work.

Mr. DENMAN.—Just a short time, wasn't it,—a very short time?

A. Yes, just a short time, a very short time.

Q. How far, in your judgment, had the "Kern" proceeded ahead under her own engine?

A. Not to exceed forty feet.

Q. What did you do after you got on the rock barges?

A. Well, I stayed on the rock barges until a boat came from the "Elder" and took me off. I could not get back on the "Kern" again.

Q. Where did you go then?

A. I went aboard the "Hercules."

Q. Captain, what is the customary danger signal on the Columbia River? A. Four whistles.

Q. Four whistles, of what character?

A. Four short whistles sounded in rapid succession.

Q. How did they correspond with the four whistles which were blown by the "Kern"? [146]

A. Very good. They were blown; there was four short whistles blown in rapid succession.

Q. What depth of water, Captain, if you know, was there between the "Kern" and the Washington shore? A. There was sixty-five feet.

Q. What would you say as to the depth of water for vessels of the class of the "Elder"?

(Testimony of J. E. Copeland.)

A. There was plenty of water.

Q. And how far off was the collision from the Washington shore?

A. Well, it was between six and eight hundred feet, as near as I could get at it. I never measured it, never had any way to measure it, but that would be my judgment.

Q. How close could a steamer like the "Elder" run to the Washington shore?

A. Well, she could run within forty feet of the Washington shore.

Q. How much of the distance between you and the Washington shore was channel for a vessel the size of the "Elder"? A. Almost the entire distance.

Q. What was the character of the night?

A. It was clear; a clear night, starlight.

Mr. CAMPBELL.—I think that is all, just now.

Mr. DENMAN.—Let me ask just one question before we adjourn.

Cross-examination by Mr. DENMAN.

Q. As I understand it, after you were struck the "Elder" drove your around about ninety degrees so you were pointed right at the Washington shore?

A. Almost right directly at the Washington shore, yes, sir.

Q. And that was from pointing straight downstream around [147] into the shore?

A. Yes, sir.

Q. So when she struck you you were pointed straight downstream? A. Yes, sir.

Q. So when the manoeuver was over you were

(Testimony of J. E. Copeland.)

pointed in to the Washington shore? A. Yes, sir.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—How was the helm at that time? A. Hard aport.

Mr. CAMPBELL.—Hard aport.

The COURT.—Is that all with this witness?

Mr. DENMAN.—Yes.

The COURT.—Very well. The Court will adjourn until to-morrow morning, 10 o'clock.

Court was thereupon adjourned until Tuesday, February 6th, 1912, 10 o'clock A. M. [148]

**Testimony of J. E. Copeland, for Libelant
(Recalled).**

Portland, Ore., February 6, 1912, 10 A. M.

J. E. COPELAND, recalled by libelant.

Questions by Mr. CAMPBELL:

Captain, was any damage done to the port side of the "Kern"? A. Yes, sir.

Q. Will you describe what it was?

A. The port side of the "Kern" on the—well, you might say forty feet abaft midships, was crushed by the impact as she came between the barges and the "Elder."

Q. Looking at Libelant's Exhibit 1, whereabouts on the port side was it, if you can indicate on this exhibit?

A. Just across opposite this house; that would be about there, on the port side.

Q. Opposite which house?

A. This house, this deck-house here. It would be

(Testimony of J. E. Copeland.)

right along here on the port side.

Q. Where with respect to the rigging?

A. I would say right underneath the rigging; from the rigging aft, this way; that is a davit here; the davit was crushed in and the bulwark on this side.

COURT.—Better make some mark there to get it in the record.

A. Beginning from the rigging and running aft on the port side.

Q. You put your “D” on the starboard side, which corresponds to the position on the port side.

COURT.—This is the injury that the boat received from the dredge?

Mr. CAMPBELL.—No, from the scow; when thrown against the scow. [149]

COURT.—I meant scow, tow.

Mr. CAMPBELL.—We will later call the surveyors who will show exactly what the damage was.

A. Beginning from there and running aft, the bulwarks were crushed in right here where the shrouds come down and take hold; the bulwarks and guard were doubled over on the side.

Q. On the port side?

A. On the port side, yes, sir.

Q. And what did that damage?

A. It was from being slued around against the barges by the “Elder.”

Q. Captain, in going ahead on the “Kern’s” engines in which way would—if the helm was hard aport, which way did that slue the stern, if at all, of the “Kern”?

(Testimony of J. E. Copeland.)

A. Slue the "Kern" downstream, or away from the "Elder," and the bow upstream.

Q. Which way with respect to the directions of port and starboard? A. It would slue it port.

Q. Port? A. Downstream.

Mr. FULTON.—Slue the stern to port.

A. Stern to port.

Mr. FULTON.—And the bow to starboard?

A. Yes, sir.

Q. Which way would that be with respect to the "Elder"?

A. It would be away from the "Elder."

Q. Can you just show the Court by means of these models just what you mean?

A. The "Elder" in going down the stream was in a position like [150] this, your Honor, and the helm of the "Kern" was to port—would have a tendency to throw her in this condition, you see; throw her around in this condition, as she moved her head away from the "Elder"; if the stern was here, to throw her from the "Elder" and move in this direction.

Q. How far, in your judgment, did the "Kern" go ahead in working her engine?

COURT.—He answered that yesterday—forty feet.

A. I don't think it would exceed forty feet.

Q. Where were you when you first saw the "Elder"?

A. I was standing in the pilot-house, on the star-

(Testimony of J. E. Copeland.)

board side of the pilot-house, looking out the star-board door.

Q. If you had been master of the steamer "Kern," or if you had been in charge of the navigation of the "Kern," what would you have done?

A. I should have blown four whistles, the danger signal.

Q. What would you have done with reference to the maintaining of the position of the "Kern" as she was then?

A. I should certainly have turned her head under full steam.

Q. How would you have put your helm?

A. Aport.

Q. Why would you have done that?

A. In order to get out of the way of the "Elder."

Q. Did you hear—you didn't hear the testimony of the master—

A. No, sir.

Q. —of the "Kern's" master here—the pilot?

A. No, sir.

Q. The pilot testified that when the "Elder" blew her first whistle she was this side of Cooper's Point and was headed for him, showing all three lights, that is her starboard light, her port [151] light, and her headlight. What would you have done with the "Kern" at that time if you had been in charge of her navigation?

Mr. DENMAN.—I submit this is not proper examination. That is a matter for the Court to determine. This man was not in charge of the vessel. What he would have done has nothing to do with what the man

(Testimony of J. E. Copeland.)

himself in charge did do. It is for him to explain his reason, motives and purposes. This, I think, is entirely irrelevant and calling for the opinion of the witness.

COURT.—This man is an expert.

Mr. CAMPBELL.—Calling for the opinion of an expert, if the Court please, as to navigation.

COURT.—I think I will allow it in on that ground.

A. I should have done just as the pilot did. I should have blown the four whistles and tried to get out of the way.

Q. Captain, if the “Kern” had succeeded in getting out of the way, with the “Elder” headed as she was when you first saw her, what, in your judgment, would have been the result?

A. She would have struck the barges.

COURT.—What is the object of that? To show that the “Elder” would have sustained serious damage?

Mr. WOOD.—Yes, your Honor, the idea is to show that his danger whistle would not only have regard for the “Kern’s” safety, but for the “Elder’s,” as well. Here were three barges, loaded with stone, floating in there.

Mr. DENMAN.—We were not asking to go on that side; we were asking to go on the other side.

Mr. CAMPBELL.—That is a different question, Mr. Denman, entirely.

Mr. DENMAN.—You called us to go right on the side of the vessel where you had the barges. [152]

Mr. CAMPBELL.—There is no evidence in the

(Testimony of J. E. Copeland.)
record of that, so far.

Mr. DENMAN.—We will show when you get through with this witness.

Q. When you first saw the “Elder,” Captain, what position did she occupy with respect to the “Kern”?

Mr. FULTON.—We went over that yesterday. He said she was coming right at her, amidships.

COURT.—I think we went over that.

Q. What did you mean when you said “coming right at her amidships”?

A. May I show by the models here?

Q. Yes. Record it on the paper if you will, so we may have a permanent record of it.

A. When I first saw the “Elder” she was nearly in this position, heading, you see, just about for our amidships here. In looking out the starboard side I could look back and see all three of her lights burning; as she got down to the head, just about where amidships would strike us, about this condition had we remained where we were, but when the pilot gave the blast to go ahead—

Q. Just a moment. I want you to place the models so as to show the position of the vessels when you first saw them.

A. Of course, we would consider this forty feet away here; if you consider this forty feet, that was my judgment; of course, it might have been nearer, might have been farther. The distances I am not able to judge, but you see that headed just about amidships, and looking out the starboard side of the

(Testimony of J. E. Copeland.)

pilot-house here I could see both sidelights and her mast light. That was her position when I looked out.

[153]

Mr. FULTON.—That was before you put the power on, was it?

A. No, the power was on at that time.

Mr. DENMAN.—Just put on, wasn't it?

A. Just before I looked out, yes, sir.

Mr. DENMAN.—Just on?

A. Probably been on a second or two.

Mr. DENMAN.—Probably been on a second or two. Couldn't have moved any in that time—at a standstill.

A. As soon as a vessel of that description turns a wheel she begins to slue almost immediately; even before she starts ahead she will begin to slue, because the power pulls on that rudder or wheel.

Q. What do you mean when you say the vessel begins to slue? A. She will begin to turn this way.

Q. Which direction?

A. Downstream; the stern downstream, which would be port. Her stern immediately began to swing to port as soon as the wheel began to turn.

Q. Now, Captain, after her engines were working, in what position did the "Kern" turn? Show by the "Kern's" model.

A. She turned that way. Her stern to port and her bow to starboard, in that position. More toward—so it seemed toward the Washington shore all the time.

Q. As shown by the dotted line which I now draw?

(Testimony of J. E. Copeland.)

A. Yes, sir.

Q. Did she simply turn, or what did she do?

A. For an instant she would, after she began to get under way, she would move slowly ahead, very slowly, because you understand there was a line out here, leading to this barge, which would retard her headway considerably. [154]

Q. That is the barge on the port side?

A. Yes. It would retard the "Kern's" headway considerably and she wouldn't get under headway very rapidly on account of the line that holds the barges.

Q. I understood you to say she would move on the dotted line.

Q. She would move ahead, a little, yes, until the line came tight.

Mr. CAMPBELL.—I will offer this drawing in evidence, if the Court please.

(Marked "Libelant's Ex. 9.")

Q. Captain, where, in your judgment would the "Elder" have hit the "Kern" if she had not moved?

A. About this way; if the "Kern" had not moved she would have struck her here.

COURT.—Mark it on the original.

Q. Mark with the letter "E."

(Witness does so.)

Mr. DENMAN.—Now, this letter "E" refers to the point on the solid line, not the dotted line?

A. On the solid line, yes, sir. If the "Kern" had not moved or slued around, there, in my judgment,

(Testimony of J. E. Copeland.)

is where the "Elder" would have struck her, and she come straight ahead.

Q. Captain, referring to Exhibit 4, when the steamers come down the channel, passing Waterford Light, and past Cooper's Point, which side of Puget Island do they pass?

A. Which side of Puget Island—pass on the Oregon side of Puget Island.

Q. That is the lower side, as shown on the chart.

Cross-examination.

Questions by Mr. DENMAN:

Captain Copeland, you have been a pilot on these waters, have you? [155] A. Yes, sir.

Q. What credentials have you held?

A. I have held master and pilot's license for the Columbia River and its tributaries.

Q. Were you ever on the "Elder"?

A. No, sir. I have been aboard the "Elder," but have never handled her.

Q. What sort of a wheel has she, left-hand or right-hand wheel? A. She has a left-hand wheel.

Q. What is the effect of reversing with a left-hand wheel when you are going ahead ten or twelve knots an hour?

A. Well, it would have the effect of throwing her stern starboard.

Q. And her head to port? A. Yes, sir.

Q. So that after you begin to reverse and while she is still going ahead with her momentum, the tendency would be for her to go over to her left or port?

A. Yes.

(Testimony of J. E. Copeland.)

Q. Now, that is practically universal with left-hand wheels, isn't it? A. Sir?

Q. That is practically universal with left-hand wheels, isn't it? A. Yes, sir.

Q. Is the rudder of very much use on a steam vessel when you are reversing, but still going ahead under your momentum?

A. The rudder would be of use in going ahead only; not in backing up. After the vessel gets way on her backing, then the rudder is of no use.

Q. I mean even when going ahead it isn't of very much use, is it? [156]

A. Yes, if the vessel is moving ahead at the rate of ten or twelve knots an hour it would have a tendency to slue her stern, even though the vessel was working back.

Q. What I want to ask you, as an expert, is: I understand that nearly all your profession is agreed on this—that the result of the disturbance created by the reversing at the stern when the vessel is going ahead is to diminish the power of the rudder very strongly, so it has comparatively little efficiency.

A. Yes, it would not have very much effect, of course, but still if a vessel was moving ahead at the rate of ten or twelve knots it would have some effect still.

Q. Have some effect still? A. Yes, sir.

Q. Now, let me ask you this question: How much distance would the "Elder" have to travel to turn completely around?

(Testimony of J. E. Copeland.)

A. How much distance would she have to travel to turn completely around, had the helm been hard over, do you mean?

Q. Yes.

A. Well, that is pretty hard to say. Just make a complete—

Q. I know, presuming she is going ten knots.

A. Yes, going ten knots ahead. I couldn't—it would be pretty hard to tell just how far she would travel; travelling in a circle, of course, with her helm hard over, she would not travel as fast as she would straight ahead—

Mr. WOOD.—You don't suppose reversing?

Q. Oh, no, going straight ahead. Has the power on and going straight ahead; how far would she travel in turning a complete circle?

A. I should judge at least a mile. [157]

Q. At least a mile? A. Yes.

Q. That is, the circle would be a mile around?

A. Yes, sir. That is, if she was under way, running ahead full steam, and then you put the helm hard over?

Q. Yes.

A. I would judge she would travel in a circle at least a mile.

Q. That is to bring her back to the point?

A. Yes, sir.

Q. Now, let me ask you: Suppose your course lies straight ahead and you put the helm of the "Elder" hard over to port; how much would she turn to starboard in running five hundred feet?

(Testimony of J. E. Copeland.)

A. Probably the length of her.

Q. That is three hundred feet to the starboard?

A. I don't think she is three hundred feet long, is she? Probably two hundred feet.

Mr. FULTON.—She is over two hundred feet. I think in the neighborhood of two hundred and fifty.

A. I don't know just how long she is.

Mr. FULTON.—(To the Pilot.) What is it?

PILOT.—Two hundred and fifty.

Mr. FULTON.—Two hundred and fifty feet, the pilot says.

Q. Suppose you double the distance. Suppose going a certain course with the boat's helm hard aport and you run one thousand feet, how much will she turn off the course?

A. That is pretty hard to tell, because when you put the vessel's stern hard over she slows up. She doesn't run full speed. Besides that, the water has all the effect on one bow, and it has a tendency to slow the vessel. It is pretty hard to tell.

Q. It would be a great deal more than two hundred feet, of course, in that time. [158]

A. Yes, it would be more than two hundred feet.

Q. Possibly four hundred feet? A. Likely.

Q. You wouldn't want to contradict our experts, if they were to testify that way?

A. No, I would not undertake to contradict an expert on that; because I never tried it.

Q. Well, you have no doubt in your mind, though, that if a man had five hundred feet to travel and he was going at the rate of ten or twelve knots, that

(Testimony of J. E. Copeland.)

he could throw his boat over a couple of hundred feet in this five hundred feet?

A. He ought to be able to throw it over that far.

Q. Who did you have on the "Kern" that night?

A. What did we have on the "Kern"?

Q. Whom did you have—what men.

A. Captain Moran, the pilot; Ed Anderson as mate, and C. W. Spaulding as Chief Engineer, Hans Jensen, Assistant Engineer, four sailors.

Q. What were the names of the sailors?

A. Let's see; there was Paul Lipp, Arne Arneson, Mike Nimm—I believe I have forgotten the other sailor's name.

Q. Who were on deck at that time?

A. All the sailors, and the mate was on deck.

Q. That is Anderson? A. Yes, sir.

Q. He was the chief officer in charge at that time?

A. Yes, sir, he was in charge of the deck. Besides this, there were two firemen, two oilers, and the messboy, and the cook.

Q. They weren't out on deck?

A. They were not on deck. [159]

Q. Now, do you recollect testifying before the United States Inspectors that before you applied any power—I will find the exact place in a minute, but I think you will recall the testimony—before you applied any power on the "Kern" she was pointing a little towards the Oregon shore, and that the effect of applying your power was to make her point straight up and down the stream? Do you recall that testimony?

(Testimony of J. E. Copeland.)

A. No, sir, not that I gave.

Q. I will recall it to you. Page 19, the Captain—"He came on deck at about ten minutes past twelve, and of course practically took charge of the boat. I was on deck sometime afterwards, a few minutes afterwards. Q. Now, how was the helm of the 'Kern' at the time? A. When I got into the pilot-house the helm was hard aport. Q. Hard to port? A. Yes, sir. Q. That would send her"—Senator Fulton was asking—"That would send her across the channel—"

Mr. WOOD.—Is this the testimony before the Inspectors?

Mr. DENMAN.—Yes.

Q. (Continued.) "That would send her across the channel towards the north bank or the Washington shore."

A. That is right, but you said—

Q. One moment. That was the question to you. The answer is, "Well, it would swing her straight. She was a little, might have been just a little bit thwartships of the channel and by putting the helm hard to port would swing her directly up and down the channel or swing it toward the Washington shore" So that the result of that testimony, is it not—I am asking you—that it would swing her toward the Washington shore, and finally get her straight up and down in the channel.

A. Yes, but you said the Oregon shore a moment ago. [160]

Q. It must have been pointing to the Oregon shore

(Testimony of J. E. Copeland.)

if by putting the helm hard aport it would swing her straight up and down the channel—must it not?

A. Not necessarily. You understand—

Q. One moment, I will disclose my ignorance when we get further along. Now, you say that the effect of applying a power would be to throw her head to the right? A. Yes, sir, to the Washington shore.

Q. I am going to ask this question again. I am asking if it is not true? A. All right.

Q. The effect of applying your power is to throw your head to the right, is it not? A. Yes, sir.

Q. Now, if the result of applying that power would make her head straight up and down the stream, she must have been to the left, must she not?

A. Well, she might have been to the left. You see the stream makes a bend there. You understand the stream makes a little bend there. before we go straight down, across to the Oregon shore.

Q. Let's see what that bend is.

A. Well, a very slight bend, you see. (Illustrating on Libellant's Ex. 4.) You see, we were out here, down this way; then we would necessarily have to come down through here and come across here, this way.

Q. So if you were pointing straight down the channel you would be pointing toward the Oregon shore, would you not?

A. Well, might be pointing a little towards the Oregon shore at that place. [161]

Q. Then when you said, "It would swing her straight. She was a little, might have been just a

(Testimony of J. E. Copeland.)

little bit thwartships of the channel, and by putting the helm hard to port would swing her directly up and down the channel”—when you said “thwartships of the channel,” you must have meant that she was thwartships towards the Oregon shore, mustn’t you? A. No, sir, I don’t think so.

Q. Then how could you, swinging her head to the right, swing her up and down the channel unless when she had previously been thwartships she was pointing to the Oregon shore?

A. Does that evidence say up and down the channel?

Q. It does. I will read it again. “She was a little, might have been just a little bit thwartships of the channel, and by putting the helm hard to port”—which you say would swing her in this direction. (Indicating.) A. Yes, sir.

Q. (Continues reading.) “Would swing her up and down the channel.”

A. If that was her position that is what it would do.

Q. This is what you testified before the Inspectors, is it not? A. To the best—

Mr. CAMPBELL.—I think you should read the whole answer.

Mr. DENMAN.—I read it all the first time.

Mr. CAMPBELL.—But you didn’t read it all the second time. I think you should read it all.

Q. Of course in going over, you would be going over from the Oregon to the Washington shore, wouldn’t you? But your testimony is that it would

(Testimony of J. E. Copeland.)

swing her straight up and down the channel; she would be going from the Oregon shore to the center of the channel. That is correct?

A. That would be correct, if that is the evidence.

[162]

Q. Now, I have Libellant's Exhibit 9 before me, and I see here that you have drawn the relative position of the "Elder" and the "Kern" in the solid lines, before the "Kern" had moved. That is correct, is it not? A. Yes, sir.

Q. Now, where, you usually had met these others about at Eureka, had you not?

A. No, not usually. We were just as liable to meet her at Waterford Light as at Eureka. We met along there within two or three miles of that place most any place. We had no regular place of meeting. We went until the boats met. Sometimes went as far up as Stella.

Q. As a matter of fact, you hadn't met at this place for some time. You had been meeting somewhere else?

A. No, I don't think so. I think we had met there regularly for three or four nights.

Q. At that place? A. Yes, sir.

Q. You testified otherwise, I think, Captain. I will look it over.

A. Of course, if I had my log-book here I could tell exactly, but the log-book went down with the boat. But to the best of my knowledge we had been meeting along there for several nights.

COURT.—Was the log-book lost?

(Testimony of J. E. Copeland.)

A. Yes, sir; lost with the boat.

Q. How was this combination of tug and barges located with reference to the middle of the channel at that point that night?

A. They were a little on—just on the out edge of the channel I presume, if you could define the channel. There is really no defined channel at that place—deep water clear across [163] the river, but we were sunk in sixty-five feet of water, if I remember correctly, and in sounding two hundred feet from the stern of the “Kern” out toward the Oregon shore, in two hundred feet it ran from sixty-five feet to forty-five—up to forty-five.

Q. Well, forty-five feet of water is plenty of water for anything coming in this? A. Yes, sir.

Q. Then you were exactly, or nearly exactly, or just exactly in the fairway of where the ships run?

A. No, we were outside. Were a little outside of where the ships usually run.

COURT.—To the south?

A. To the southerly, toward the Oregon shore.

Q. Now, Captain Copeland, don't you recall testifying before the United States Inspectors as follows: The same question was put to you I have just put to you. “How were you located with reference to the middle of the channel at that point that night. A. I think, Senator, we were just exactly, nearly exactly in the fairway of where the ships ran.”

A. Well, the ships ran clear across there, you understand.

Q. One moment, let me put the whole statement in.

(Testimony of J. E. Copeland.)

A. Very well.

Q. (Continues reading.) "They usually run just about as nearly as I could tell, about eight hundred feet off shore there; that is, some of them do; some of them run closer; some of them further out."

A. Yes, sir.

Q. (Continues reading.) "We don't all run quite the same place there; the water is very deep and there is room enough for them [164] to run almost any place." A. Yes, sir.

Q. (Continues reading.) "You were practically then in the fairway? A. I was practically in the fairway, yes. I think about where all the ships aim to run." Now, you remember testifying to that, don't you?

A. I remember testifying to that, yes, sir, and after—may I make a statement?

Q. Yes.

A. After having made the testimony, I did the sounding. I had never sounded the channel at that place before, and I found that we were just at the out edge of where the sands begin to rise to over toward the Oregon shore. After I made the soundings—

Q. You didn't have to sound to tell where the ships had been running before that?

A. Pretty hard to tell just exactly where they ran; of course they may run in a little ways; they may run out at that place, but there is no range to run on. No lights to run on there.

Q. But coming around from the two curves, they

(Testimony of J. E. Copeland.)

take the shortest route, don't they?

A. No, if they took the shortest route, they would run in close to the Washington shore.

Q. I mean as short as practicable? A. Oh, yes.

Q. So when speaking of the fairway of ships, you are speaking of the fairway with reference to the ordinary course of commerce on the stream, weren't you? A. Yes.

Q. And that was directly in the fairway of the ordinary commerce of the stream—the usual course vessels take to go up the river and the shortest distance. That is correct, isn't it? [165]

A. In a way, I suppose it is.

Q. What way is it not correct?

A. Because they are liable to run any place in that place. There is no defined channel there; we have no defined channel at that place. No range by which ships—

Q. I am not talking about the channel, I am talking about the fairway.

A. The fairway is the channel.

Q. Take a big harbor, where there is no question about depth at all; the fairway is the regular route.

A. Then if there is no question about the depth, that would be channel all over the river.

Q. There is no question of depth between these two shores; you could travel anywhere there, couldn't you?

A. If a vessel didn't draw over thirty feet she could go anywhere.

Q. Have you any vessels on this stream drawing

(Testimony of J. E. Copeland.)

over thirty feet? A. Not that I know of.

Q. You never heard of any? A. No, sir.

Q. A vessel could travel anywhere between these two shores? A. Practically.

Q. When you speak of the fairway on this you don't have reference to the depth of the water but have reference to the lines of travel, don't you?

A. Yes, a person would have reference to lines of travel, but there is eight hundred feet in which they may travel in that place and do travel in that place.

Q. There are four thousand feet in which you could travel in that place? [166]

A. I don't know if that wide.

Q. Over three thousand feet? A. Yes, sir.

Q. So when you speak of fairway you have reference to the route taken by the vessels and not depth of water? A. Yes.

COURT.—Do ships run on a course as they pass that point?

A. Do they run on a course?

COURT.—Yes.

A. No, sir—well, some vessels do and some vessels do not; I don't know the compass course.

COURT.—I had a case once before where the ship was running on a course and it made Waterford Light one of its points.

A. We do that in a fog; yes, sir. We would make Waterford—make Cooper's Point light about abreast of Waterford Light. You understand, your Honor, there is something of a curve between the two lights and in running—I make two courses, in

(Testimony of J. E. Copeland.)

running a course there, in order to bring me abreast of Waterford Light and close enough to Waterford Light that I may be able to see the light when I get abreast of it.

COURT.—What is the course at the point where the collision occurred?

A. I presume most everybody has a course, but you understand the compasses don't run the same; one compass may run a quarter off or a half off to what another compass will.

COURT.—Do you have a course to run down there?

A. Yes, sir.

COURT.—How near does your course come to where this collision occurred?

A. Just on the inside of the line there. It would bring— [167] well, probably three hundred feet inside where the collision occurred.

COURT.—That is towards the Washington shore?

A. That is towards the Washington shore, yes, sir.

COURT.—That is your course?

A. That is my course.

COURT.—Do you know the “Elder’s” course?

A. No, sir.

COURT.—What was the course of ships generally?

A. No, sir; I could not tell, because I have never piloted any of these deep sea vessels.

Q. Of course, you meant it when you said before the Inspectors that your vessel was right in the fairway at the time?

A. Of course, I meant what I said. I meant the

(Testimony of J. E. Copeland.)

vessel was in a place where any vessel could run.

Q. Well, now, you say "any vessel could run."

A. Any vessel that plies these waters could run where I was.

Q. Well, isn't that really where they aim to run?

A. I don't know about that now, whether they aim to run in that one particular place or not, because I have seen them much closer to the Washington shore, and I don't know that I ever saw them any farther out.

Q. Now, do you remember your answer as follows: "I was practically in the fairway. Yes, I think about where all the ships aim to run"?

A. Probably. I have seen them much closer.

Q. Then you did say you were just where the ships aimed to run? A. To the best of my knowledge.

Q. Then you were not a little ways out of it, were you? [168] You were in it, just where they aim to run. That is correct, isn't it?

A. So far as I know. I said a moment ago I had never piloted any of these deep water vessels, except when a pilot was along with us.

Q. You see, Captain Copeland, I asked you if you thought that was where the ships aimed to run. You said no. I now ask you whether that was to testimony you gave. You say yes. I want to know which you mean.

A. Well, you misunderstand. I tried to explain to you they don't run in the same place all the time, and I think I said so before the Inspectors. If I

(Testimony of J. E. Copeland.)

didn't it was an oversight, because it was the intention.

Q. Now, you said, "They usually run, just about as nearly as I could tell, about eight hundred feet off shore there, that is some of them do. Some of them run closer and some of them farther out."

A. That is what I said now.

Q. Now, it would have been perfectly safe and secure for you to have run the barges, for the purpose of exchange, half a mile from the Washington shore that night, wouldn't it? A. Oh, I think so, yes.

Q. The weather was perfectly still, wasn't it, practically? A. I think so.

Q. I mean there was no current?

A. There was no current to speak of.

Q. Now, you say, Captain, that you had been—that it was your custom to—that before that you had been exchanging these barges at this point in the river or about this point in the river. [169]

A. Yes, we had exchanged there a good many times.

Q. I mean about this time when this thing occurred. A. Yes, sir.

Q. Before the United States Engineers: "You say that you have usually made up or exchanged tows in that vicinity? A. In that vicinity, yes. Sometimes higher up, occasionally lower down. Not very often lower down, more times higher up. Q. As a rule, higher up? A. Yes, as a rule. Q. At what point?

A. Well, for I think six or seven trips right in succession, we didn't vary a half a mile from Eureka, which is about two miles higher up than where we

(Testimony of J. E. Copeland.)

met on the night of the 18th—or the morning of the 18th.” Do you remember that testimony?

A. Yes, sir.

Q. Well, then, you had been, just preceding that, been exchanging these barges at this point?

Mr. CAMPBELL.—We submit that the testimony does not state anything of that kind, if the Court please.

COURT.—Let me ask a question. Had you or had you not?

A. Had I or had I not been exchanging at that point?

COURT.—Yes.

A. Just as I said in the testimony before the United States engineers.

Q. That is all right? That testimony is correct, then, is it?

A. As nearly as I remember. Of course, I don't know where we had exchanged the two or three nights prior. As I said a moment ago, I could tell if I could get my log-book, but that is impossible.

Q. Now, your practice in exchanging was for the tug having the heavy barges, or loaded barges, to wait alongside until [170] the other tug came along, was it not?

A. Not alongside, no, sir, but waited in the river. Waited in the river until we let go the empties and went back down to the lights.

Q. What do you mean by “waited in the river”?

A. Well, waited in the river any place we would happen to meet. The “Hercules” would stop and

(Testimony of J. E. Copeland.)

drift along until we would let go the empties. Sometimes be half a mile up the river from us before we got clear of the empties. We turned around and backed down and before we got there she would pick up and take the headway off the barges so they would be as steady as possible as we went to go between them and as we get probably two or three hundred feet off her stern she would back out and we would take our place.

Q. She would not back up until you came right down there so you could slip in?

A. Yes, would hold on until we got near to her, probably two or three hundred feet away.

Q. You were not awake then?

A. Yes, I was awake, but wasn't up.

Q. You don't know whether it was so this night or not? A. I could not say.

Q. You are not in position to contradict the testimony to the effect that this was an exception this night and it wasn't done this way?

A. I don't know whether done a different way that night because I wasn't out of my room. I was awake when we exchanged.

Redirect Examination.

Q. Captain, what width of channel was there between the "Kern" and the Oregon shore of sufficient depth for the "Elder" to have navigated? [171]

A. To across within fifty or one hundred feet of the Oregon shore.

Q. How wide in your judgment would that channel be?

(Testimony of J. E. Copeland.)

A. I would say that channel at that place is probably one mile—something over a mile wide—at least a mile wide at that place, from one shore to another.

Q. What was the width of the channel between the “Kern” and the Washington shore of sufficient depth for the “Elder” to have navigated?

A. Well, I believe I have said the distance was about eight hundred feet from the Washington shore to where the “Kern” sunk and the “Elder” could have run—well, I think I said yesterday the “Elder” could have run within forty feet. I don’t know if it could have run within forty feet or not, but am sure she could have run within one hundred feet of the Washington shore and think could have run within forty feet of it, because the water is very deep and the bank is very bluff at that place.

Mr. CAMPBELL.—I want to read into the record the complete answer to the question to which Mr. Denman read a part.

Mr. DENMAN.—I beg pardon, I read every portion of it.

Mr. CAMPBELL.—Not at the time I asked you to.

Mr. DENMAN.—I am glad to have it in, so long as it shows. What I object to is the statement that I didn’t read it in.

Mr. CAMPBELL.—You have no objection to my reading it in?

Mr. DENMAN.—No objection except to the statement that I didn’t read it.

Mr. CAMPBELL.—Not at the time I asked you to.

(Testimony of J. E. Copeland.)

Mr. CAMPBELL.—(Reading:) “Q. That would send her across the channel towards the north bank or the Washington shore? A. Well, it would swing her straight. She was a little—might have been just a little bit thwart ships of the channel and by putting the helm hard to port would swing her directly up and down the channel or swing her toward the Washington shore.” That is the latter part that was left out at the time I asked to have it in.

Mr. DENMAN.—Of course “swing toward the Washington shore” was going from the Oregon shore and was going straight up and down the channel.

Q. Mr. Campbell asked you to give us a little law, and I am going to ask you as an expert some questions. Suppose this situation: That the “Kern” is pointing a little bit ’thorships the channel, as you have described here, towards the Oregon shore, and the “Elder” coming downstream so that she will split her in the middle fore and aft from behind, you are standing by the pilot-house and you turn around and you hear one signal whistle and see that the vessel is a thousand feet directly astern, how long would you have to watch the approaching vessel before you could determine whether or not she was swinging to pass you to starboard?

A. How long would I have to watch the overtaking vessel? Well, that would depend on a good many things. It would depend on how far they put their helm, in the first place. If they put their helm hard over the probabilities are I would not have—the probabilities are that I would not have to watch her

(Testimony of J. E. Copeland.)

over a half a minute.

Q. I see. Now, suppose that if she properly executed that [173] maneuver, that is to say, she gives one whistle and puts her helm over—by the way, what is the beam of your vessel?

A. Twenty-six feet.

Q. If she was going to split you right in the middle, it would be thirteen feet clear, wouldn't it?

A. Yes.

Q. Suppose you are looking at the "Elder" to see whether or not she is executing that maneuver to go to starboard and clear you—there was plenty of room to clear you on this night, of course?

A. Yes, sir.

Q. On the Washington shore, or towards it. Suppose you were looking at her, you think it would be half a minute before you could tell whether she was swinging to execute that manoeuver?

A. I think it would, because she would necessarily have to swing enough in order to throw her mast light out of line with the vessel or shut off her starboard light.

Q. Now, you would have to wait that long before you determined whether you would permit her to come?

A. That would depend altogether on how they handled their helm.

Q. Depend altogether on how they handled their helm? A. Yes, sir.

Q. Now, after a man has requested you for permission to pass your starboard, how soon can he begin to

(Testimony of J. E. Copeland.)

execute the maneuver? Must he begin at once, as soon as he asks permission?

A. I believe that is the law.

Q. That is your understanding of the law?

A. Yes, sir.

Q. Before he gets your answer he must begin to maneuver at once?

A. He must put his helm over when he blows his whistle.

Q. That is your understanding of the law? [174]

A. Yes, sir.

Q. And it is on that understanding of the law that you said you would have done exactly the same thing that Mr. Moran did on that night? A. Yes, sir.

Q. Basing your answer on that condition of the law? A. I believe so.

Q. Of course there was plenty of room in a thousand feet for the "Elder" to have cleared you?

A. Yes, there was plenty of room.

Q. I mean when she was a thousand feet away she had plenty of room?

A. She had plenty of time to clear us; yes, sir.

Q. And plenty of room to pass?

A. Plenty of room to pass on either side.

Q. Well, but on the other side of you were these three barges; is that correct?

A. No, not when the "Elder" blew her whistle to pass they wasn't on the other side of us; they were almost ahead of us. You understand, we were lying with our head to the barges and had a line on the barges. The barges had not turned around at all

(Testimony of J. E. Copeland.)

after the "Elder" struck us. Then they was on the port side of us after that.

Q. Don't you know the barges were lying pointing towards the Oregon shore on the port side of your vessel?

A. Slightly. But didn't I say also the vessel was pointing towards the Oregon shore?

Q. Well, that is correct, is it?

A. That is my evidence.

The COURT.—You mean the "Kern"?

Mr. DENMAN.—The "Kern." [175]

The WITNESS.—That is the evidence just given.

Q. The "Kern" was pointing towards the Oregon shore?

A. Not as much, however, as the barges. You understand they were not as much as the barges, because the barges were lying a little across our bow, or rather we were lying across the stern of the barges a little.

Q. In other words, in looking downstream behind you the barges were on your port side?

A. A little on the port bow, under the port bow of the "Kern," the stern.

Q. Well, they were on the port side of the "Kern," were they not?

A. The stern of the barges were.

Q. Now, let me ask you to examine Exhibit Number Five.

The COURT.—It is Number 6, isn't it?

Mr. DENMAN.—Yes.

Q. (Continuing.) This is the Oregon shore here

(Testimony of J. E. Copeland.)

(indicating). A. Yes, sir.

Q. These are the barges pointing towards the Oregon shore (indicating). A. Yes, sir.

Q. And the "Kern" was here (indicating): Is that correct?

A. That is correct, as near as I can get at it.

Q. Then the barges were on the Oregon side of you?

A. There were some on the Oregon side, as I stated; they were under the port bow, you understand. Here is the stern of the barges. Now, when we were struck we moved around alongside of them; we were not lying alongside of them before we first struck.

Q. Now, coming down the stream, then, the "Elder" would have these barges obstructing her on the port side and nothing to obstruct her on the starboard; that is correct, isn't it? [176]

A. Draw a line across there and we will see how much obstruction she would have. She would not have had any obstruction, to speak of, from the barges.

Q. Do you suppose for a moment she was going to run on the Oregon shore down here?

A. No; but she had plenty of room to come around us on either side. Here is the Oregon shore three-quarters of a mile from us, probably, on the port side.

Q. I know; she was coming down the fairway, the regular run of ships, and the positions you had in that run of ships, as I understand it, was one where your barges were on the left-hand side in the fairway

(Testimony of J. E. Copeland.)

and on the right-hand side there was nothing in the way; that is correct, isn't it?

A. If you are a mind to term it that way; but if you draw a line straight down you will see there is nothing in the way on the port side.

Q. Then there was nothing in the way on either side? A. Practically nothing.

Q. That is an astonishing statement. How long are those barges?

A. One hundred and fifty feet.

Q. One hundred and fifty feet; you call that nothing?

A. Well, a hundred and fifty feet isn't very much in a mile.

Q. Oh, I see; but it is very much on the line of travel, isn't it?

A. Well, not where there is plenty of room, it isn't.

Q. But if the line of travel from point to point down the river is practically eight hundred feet from the shore, as you stated, a barge a hundred feet across that line of travel is an obstruction, isn't it?

A. It would be considered an obstruction, I suppose. [177]

Q. Yes. So the obstruction of the barges was on the left-hand side, your port side rather than the starboard side? A. Yes, sir.

Q. Yes; I am glad to get that far. Now, suppose a vessel is coming down the stream and asks to pass to the starboard of the other vessel, which is ahead of her, and she gets a four whistle signal from the other vessel, what must she do?

(Testimony of J. E. Copeland.)

A. She must put her engines full speed astern, immediately.

Q. And in the case of the "Elder" that would throw her, that would send her in a curve, of course, to her port, would it not? A. Yes, sir.

Q. Towards your barges?

A. Out towards the Oregon shore.

Q. Yes; at any rate towards your port side.

A. Yes, towards our port side.

Q. The result of that maneuver in this case was that she struck you in the condition shown by the model here? A. Yes, sir.

Q. Now, how could she have been directly behind you and cut you in that position, if she had been swinging on a curved course from your starboard towards you?

A. If she had been swinging, but had she been? If she had been swinging when I saw her she would have missed us, but she was not swinging when I seen her.

Q. All right. So that the statement of Michael Moran to the effect that she had been swinging for some time, and he knew it before he moved his vessel, is incorrect?

A. I don't know that that is incorrect. I could not say about that. He probably had a better view of her; he had a longer view of her than I had. That is sure, because I had only just [178] came on deck when I noticed her at the stern.

Q. I am correctly stating that, though; if she had been swinging she must have come over from the

(Testimony of J. E. Copeland.)

starboard side? If that be true that she had been swinging, she must have come over from your starboard?

A. She must have come over from our starboard. Her bow must have come over from our starboard,

Q. Yes; had she been swinging to port?

A. Yes, sir.

Q. Then she must have been astern of you on your starboard side? A. Yes, sir.

Q. To have been swinging and striking you in the position that she struck you?

A. Well, yes; she must have been slightly on the starboard end of us before she started to swing.

Q. Exactly. A. Yes.

Q. That is correct?

The COURT.—How would the “Elder” swing?

A. The “Elder” would swing with her stern towards the Washington shore and her bow towards the Oregon shore. It would be what we term swinging to starboard.

Mr. DENMAN.—Here is the maneuver. (Counsel illustrating with wooden models.) Now, she is moving ahead like that; as soon as you begin to reverse the propeller the effect is to throw her like that (illustrating).

The COURT.—To port?

Mr. DENMAN.—To port; and as she moves down she moves in a curve like this (illustrating).

The COURT.—I see. [179]

Q. Now, if she is swinging, and the captain says it is true that she was swinging—he thinks it wasn’t—but if it is true that she was swinging she must

(Testimony of J. E. Copeland.)

have come over from the starboard side of the stern to get in like that to have made the wound that was made on the other vessel; that is correct, isn't it?

A. That is correct; but you must understand the "Kern" was swinging; so it would have swung her stern away from the "Elder."

Q. I know; you said the "Kern" as the result of her manoeuver would be pointing straight up and down, because she had been pointing a little towards the Oregon shore. Now, if she points straight up and down the stream that must have been straight from her to starboard? I mean, if they were swinging she must have been over here to starboard to have made the wound in that position, mustn't she?

A. You must understand the "Kern" was swinging; the way the "Kern" was swinging would bring her in that position whether the "Elder" was swinging or not.

Q. But you said the result of the swinging of the "Kern" would bring her straight up and down stream when she was pointing over towards the Oregon side; the result would be—

Mr. CAMPBELL.—(Interrupting.) He didn't say that. You leave out a very significant part of that answer.

The COURT.—I think I understand that.

The WITNESS—Did I say she would stop swinging when she got straight up and down stream?

The COURT.—I understand the "Kern" was swinging all the time.

The WITNESS.—Until after the "Elder" struck.

(Testimony of J. E. Copeland.)

The COURT.—After the forward movement, until after the “Elder” struck her. [180]

Mr. CAMPBELL.—Yes.

The COURT.—And that the “Elder”—I don’t know; that will be developed by the testimony from the “Elder”—was probably backing and that was throwing her bow to port?

Mr. CAMPBELL.—The stern of the “Kern” and the bow of the “Elder” were both going the same direction.

The COURT.—Yes; I understand that manoeuver. Unless you want to make that plainer now, or to test the witness, I don’t think it is necessary to take up any more time about it.

Q. Suppose now we had been reversing our propeller for a thousand feet forward, that would give us a considerable curve, would it not?

A. It ought to give something of a curve, yes, sir.

Q. And in order to have struck you on the side at all she must have been coming over from the starboard side, must she not?

A. Well, the “Kern’s” movement would have thrown us to the side of the “Elder’s” bow whether the “Elder” would have been swinging or not. If the “Elder” had come directly ahead, you understand, the movement of the “Kern” would have directed the “Elder” right into our starboard side.

Q. Well, now, presuming the vessels are right behind one another and for a thousand feet the “Elder” has been curving this direction (illustrating), she would not have touched you, would she?

(Testimony of J. E. Copeland.)

A. No. If she had been backing for a thousand feet I don't think she would, because I think she would have stopped before she got that far down.

Q. So if she was curving at all and was directly behind you she was on this swinging course and directly behind you, she never would have hit you?
[181]

A. No; I don't think she would have hit us if she had been on that swinging course for a thousand feet.

Q. Well, suppose she had been on it for five hundred feet, would she have hit you if she was directly behind you?

A. Well, if she was directly behind us I don't know that she would have hit us, no; but she was a little to our starboard.

Q. You think she was a little to your starboard?

A. Yes; at least when I saw her.

Mr. CAMPBELL.—Starboard quarter?

A. Yes, sir.

Q. Then she must have been going downstream a little to your starboard?

A. I think, yes, sir; a little to our starboard.

Q. So she would have run clear of you if she had curved over?

A. Well, now, that would be pretty hard to say whether she would run clear of us or not. She would not have run clear unless she had changed her course when I seen her.

Q. How is that?

A. She would not have run clear unless she had changed her course after I seen her.

(Testimony of J. E. Copeland.)

Q. But if she was coming downstream behind you and to your starboard and traveled the usual course down the river, she never would have hit you?

A. Oh, yes; she would have hit us if she had not changed her helm when she blew her whistle. She could not have missed us if she hadn't changed her helm, I don't think; from the position she was in now, understand, when I first seen her.

Q. You were forty feet apart then?

A. Yes, we were only about forty feet apart at that time. [182]

Redirect Examination by Mr. CAMPBELL.

Q. If after the exchange of four sets of whistles the "Elder" had not changed her course, I will ask you whether or not in your judgment the danger of a collision would have been imminent?

A. Yes, sir.

Witness excused.

Mr. DENMAN.—Mr. Campbell, I should like to further cross-examine Mr. Moran before your case is closed. I thought I would tell you now so you can put him on before the other witnesses.

The COURT.—Any objection?

Mr. CAMPBELL.—We have no objection to his examining our witnesses all he wants to, if the Court please. [183]

**Testimony of Michael Moran, for Libelant
(Recalled).**

MICHAEL MORAN was thereupon recalled for further cross-examination and testified as follows:

(Testimony of Michael Moran.)

Cross-examination by Mr. DENMAN.

Q. Mr. Moran, how much did the "Elder" swing before she struck you?

A. How much did she swing before she struck me?

Q. Yes.

A. That is pretty hard question for me to answer. It would be a matter of guesswork, you know. I should judge she would swing a point or a half to a point, somewhere around there; she swung very slow, you know, as near as I could see her in the dark. It was a dark night, starlight night, a dark starlight night.

Q. She swung though sufficiently—you say only a point?

A. Well, I don't know. I wouldn't give any accurate—

Q. (Interrupting.) She swung enough to cover her lights, didn't she?

A. Well, I suppose she might. I didn't notice her immediately after she struck us when she was swinging. She might have shut out her red light; she might not.

Q. Now, as a matter of fact, didn't the red light blind before she struck? A. No.

Q. Will you swear to that?

A. No; that is right; I wouldn't swear to that. I wasn't paying any attention to her lights when she come into such close quarters as that.

Q. As a matter of fact, you did pay attention and

(Testimony of Michael Moran.)

did see her blind the red light, didn't you?

A. No, sir. [184]

Q. Do you recollect this testimony before the United States Inspectors?

A. Not at the time she struck, I didn't see her.

Q. Well, I will read you your testimony.

A. Well, go ahead.

Q. Your mind was fresh on it at that time, wasn't it?

A. Yes; right away. I might have testified to that effect.

Q. (Reading from page 55.) "And I rang full speed ahead, which would have under the conditions he was backing, and he appeared to me to be swinging and blinded his port light. His port light actually did blind from me before she struck, "which would have been making the 'Elder' swing around that way, Captain." You knew at that time how the "Elder" swung; she had a left-handed wheel?

A. Yes, sir. Well, I didn't say that her red light wasn't blinded just now; I didn't say it wasn't blinded.

Q. But when the thing was fresh in your memory you said it must have been blinded? A. Yes, sir.

Q. She must have swung quite a little bit to blind her red light?

A. Well, she probably did; but that is more than I could say, that she did swing.

Q. Well, as I understand you to say, you knew that the "Elder" had one of these left-handed wheels that

(Testimony of Michael Moran.)

would swing her to the port as she reversed; that is correct, isn't it?

A. Yes, that is correct. That is my experience with left-handed wheels, with left-handed propellers.

Q. Well, that is what the "Elder" had?

A. Yes, sir.

Q. Now, as I understood you yesterday, you said the reason why you blew the four blasts was because you could not see him [185] moving over to your starboard at the time he asked for permission to go over there with the one-whistle signal; that is correct, is it not?

A. That is correct; yes, sir.

Q. And he had abundant time to have gone over there when he was a thousand feet away without striking you, had he not?

A. He had if he had a mind to do it, yes.

Q. And your theory of the case is that before he got any response from you he should have put his helm over to port and started to make that man-eouver?

A. That is what I understand the law, to accompany the whistle by the alteration of your helm so as the other man can know what you are doing.

Q. And he must make that alteration of the helm before you have answered, giving him permission to come on?

A. He is supposed to accompany his whistle by the alteration of his helm.

Q. That is, before you give him a reply?

A. That is the way I understand the law.

Mr. FULTON.—That understanding of the law is

(Testimony of Michael Moran.)

what you based your action on in giving the danger whistle, because he didn't port his helm before you answered?

A. Yes, sir; I guess so. That is right, Senator.

Q. Now, do you recollect giving this testimony. "You must allow 'Senator,' when he blowed his one blast I waited to see if he altered his course a second or two and then gave him four blasts when I seen that he didn't deviate a particle degree, as I could see." You recollect that testimony, don't you? A. Yes, sir. [186]

Q. Before the United States Inspectors?

A. Yes, sir.

Mr. CAMPBELL.—What is the page?

Mr. DENMAN.—Pardon me. That is on page 37; and what I have got next is also.

Q. And also your statement, "Then if you did wait, whatever time you waited you waited for the purpose of ascertaining whether or not he was going to change his course, didn't you? Yes."

The WITNESS.—Yes.

Q. Then you expected him to change his course before you signified that in your judgment it was safe for him to do so, did you?

A. That was what I thought.

Q. You recollect making this statement, on page 51, "Then if you had answered his one whistle and remained where you were at, there is no question but what he would have gone by? A. Providing he had changed his course. Q. That was up to him, wasn't it? A. Yes, sir."

(Testimony of Michael Moran.)

A. Yes.

Q. You recollect making that statement?

A. I do.

Mr. DENMAN.—That is all, Mr. Campbell.

Redirect Examination by Mr. CAMPBELL.

Q. Captain, you testified that if the “Elder’s” bow was swinging to port when she was backing it would tend to shut out her port light; now, I will ask you what, if any tendency would the changing of the “Kern’s” head to starboard have upon the port light of the “Elder”?

A. Well, it would have a tendency to shut it out too. [187]

Recross-examination by Mr. DENMAN.

Q. But you did testify at that time that she was swinging?

A. Yes, sir; I saw her swinging. Before I run my engines full speed ahead I made sure that she was swinging that way.

Q. That was before you put them ahead?

A. Yes.

Q. And she had been swinging quite a little time, hadn’t she?

A. I don’t know. I wasn’t aboard of the “Elder”; I don’t know how long she had been backing.

Q. I mean she had been *swing* enough for you to see her move over?

A. Yes, sir. Enough for me to see her swinging, canting off that way. I had to wait till she got pretty close for me to find out. Now, of course all

(Testimony of Michael Moran.)

my distances there are approximate. I could not say whether these distances were really thirty or forty feet, or what they were, but as near as I could judge I give the best of my opinion on the distances.

Q. He was swinging over towards you from your starboard side?

A. She was swinging towards the Oregon shore, her head, and stern towards the Washington shore.

Q. But she was swinging, her head coming over from your starboard side, that is correct?

A. Yes, sir; that would be all right.

Q. She must have been astern of you on the starboard side somewhere to have swung that way?

A. Well, when she got down in that position she probably was. When the exchange of signals was given she was fairly well astern; probably she might have been a little bit to the starboard. Of course, a man can't exactly tell; you look out from a ship that way in a dark night, you will see her coming right [188] at you with all her three lights open and you make up your mind there is going to be a collision. From past experience in similar cases and what you have seen from time to time you naturally can't see any other way out of it, vessels getting in close quarters, that a collision is inevitable.

Q. Well, you didn't think a collision was inevitable?

A. You make up your mind it is your place to notify a man of the danger he is approaching. That was my reason for giving them four whistles, them

(Testimony of Michael Moran.)

whistles. While I said it was a thousand feet it might not have been that much and it might have been more. I could not say for certain, but judging from his masthead, the elevation of his masthead light, he was pretty close to me right from the first time he blew his whistle.

Q. Well, there was plenty of room for him, if he wanted to, to go over past you on your starboard?

A. On either side plenty of room.

Q. That is to say, he was plenty far enough away to maneuver this vessel out of your way if he wanted to?

A. Well, I should think if he slowed down and got her under control he might have done it.

Q. You say he was right behind you, going to split you up the middle, a thousand feet away?

A. Now, I told you my distances are approximated. I couldn't measure them. We will assume a thousand feet.

Q. I know you can't measure it; but I say approximately? A. Yes, that is right.

Q. Now, presuming, Mr. Moran, she is a thousand feet away, she could have turned enough in that thousand feet, with a very slight alteration of her helm to clear you, couldn't she? A. I think so.

Witness excused. [189]

Testimony of Joseph O. Church, for Libelant.

JOSEPH O. CHURCH, was next called as a witness on behalf of the libelant, and having been first duly sworn, testified as follows:

(Testimony of Joseph O. Church.)

Direct Examination by Mr. CAMPBELL.

Q. How old are you, Captain?

A. Forty-seven.

Q. Do you hold a master's license?

A. Yes, sir.

Q. Of what character?

A. Master and pilot of river steamers.

Q. On what river?

A. From Oregon City to Ft. Stevens, and to Cascades on the Columbia River.

Q. How long have you been acting in the capacity of a master and pilot on the Columbia River?

A. Since 1897.

Q. On what class of vessels?

A. Stern wheelers, mostly. I have been on tug boats, some.

Q. Were you master of the steamer "Hercules" on the night of the collision between the "Elder" and the "Kern"? A. Yes, sir.

Q. What had you been doing during the early part of the night?

A. Towing rock barges down the river.

Q. And how do you tow them?

A. Tow them one ahead of the steamer and one on each side.

Q. I will show you Exhibit 2 and ask you how you tow them with respect to the position shown by that photograph?

A. That is the way. That is exactly as the tow is made up.

Q. Is that your steamer in there? [190]

(Testimony of Joseph O. Church.)

A. Yes, sir; that is the steamer "Hercules."

Q. Where did you start with the rock barges?

A. Why, we started from Fisher's Quarry, the Columbia Contract Company's Quarry at Fisher's.

Q. Where is that with respect to Vancouver, Washington?

A. About nine miles above Vancouver, nine or ten.

Q. And where did you finally, if at all, drop the barges?

A. Well, we dropped them at Waterford, Waterford Light.

Q. About what time of night was that, if you recall?

A. Oh, I don't know; about twelve fifteen or twelve twenty, something like that; I don't know exactly the time now.

Q. Had you seen the steamer "Kern" prior to the time that you dropped the barges?

A. Yes, sir; passed it.

Q. What was she doing?

A. She passed us and then let go of the light barges.

Q. Where were you when you passed her?

A. Well, just a little above Waterford Light.

Q. What was your reason for dropping the loaded barges?

A. To change tow for the "Kern" to take the loaded ones on down and for us to take the light ones back up.

Q. Just how did you drop the barges, Captain?

(Testimony of Joseph O. Church.)

A. Stopped and backed up and killed all the head-way of them; and left them lashed together.

Q. What position were they when you left them with respect to the Oregon shore and the Washington shore?

A. Well, they were headed downstream and, oh, I don't know; I could not say exactly; I suppose five or six hundred feet probably; maybe more; from the Washington shore.

Q. Did you notice where the "Kern" was when you dropped the barges? [191]

A. Well, she had already dropped her barges and headed downstream for the loaded ones.

Q. What did you do with your vessel after you dropped your barges?

A. Backed around and started back for the light ones, to hitch onto the light ones.

Q. Did you at any time see the steamer "Elder" that night? A. Yes, sir.

Q. Where were you with respect to Cooper's Point when the "Elder" passed you, if she did pass you?

A. Well, just a little below Cooper's Point, not much; I could not say; just a little below the Light.

Q. And how far offshore from Cooper's Point were you? A. How far offshore were we?

Q. Yes.

A. Oh, we were quite a piece; probably a thousand feet offshore when we passed her. She was between us and the shore.

Q. What, if any, signals were exchanged between you and the "Elder"? A. One whistle.

(Testimony of Joseph O. Church.)

Q. Who gave the first one?

A. The "Elder" did.

Q. And what, if any, response was made?

A. I answered with one whistle.

Q. How far off from the "Elder" did you pass, what distance between the two steamers?

A. Oh, I don't know; I expect a couple of hundred feet, maybe, or three hundred maybe; something like that; I could not say. We were quite a piece apart, I know.

Q. Where were your light barges at that time?

A. They were just about abreast of Cooper's Point Light. [192]

Q. Did you hear any signals given by the "Elder" after she gave you her passing signal?

A. Yes, sir; she blowed one whistle.

Q. How was she travelling at that time?

A. How was she travelling?

Q. Your speed; your relative speed?

A. Oh, I didn't pay very much attention. I suppose it was under full speed, but I could not say that she was, because I didn't pay any attention.

Q. Did you hear any response of any other steamer to the "Elder's" one blast of the whistle?

A. Yes, sir; I heard the "Kern" answer with four short whistles.

Q. How do you know it was the "Kern"?

A. Well, by the sound of the whistle, by the noise, I suppose.

Q. How long an interval, Captain, elapsed be-

(Testimony of Joseph O. Church.)

tween the "Elder's" one blast and the "Kern's" four blasts?

A. Well, I could not say that; it was pretty close, though; it was pretty close to it, just about the usual time; I suppose a quarter of a minute, maybe; I don't know if it was that long.

Q. Were there any other signals given by either the "Kern" or the "Elder"?

A. Well, the "Elder" blowed one whistle right afterwards.

Q. What did the "Kern" do, if anything?

A. Answered with four.

Q. And what time elapsed between the second series of one and four whistles?

A. Oh, I suppose a quarter of a minute, maybe; I don't know; just a short time; just as they would naturally whistle and answer before a very short time. [193]

Q. What did you do with the "Hercules" after you heard the "Elder" give the first passing signal to the "Kern"?

A. Why, I just kept right on going up to the barges to hitch on to them, to the light barges.

Q. State whether or not you knew that a collision had taken place.

A. Well, after I had got to my barges; yes.

Q. How did you know that?

A. I heard the crash.

Q. Now, where were you at the time that you heard the crash?

A. Just about to the barges; just about, my boat

(Testimony of Joseph O. Church.)

was just about going in between the barges at the time.

Q. And what did you do then?

A. Well, we first started to get out the lines on the barges to hitch on; then I told the boys to never mind, that there was trouble down there, to let go the anchor of the barge; and I turned around and went back down to give them any assistance that they wanted.

Q. When you reached the place of the collision, what did you find?

A. Well, I found the "Kern" sinking.

Q. And which way was she headed at that time?

A. For the Washington shore. It was right just about straight across the river, just about straight in for shore.

Q. Where were the loaded barges?

A. Well, two of them was in pretty close to shore and the other one was farther out. They were scattered; two of them was pretty handy in towards the light of the Waterford Cannery.

Q. What was the condition of the weather and atmosphere that night, Captain? [194]

A. Clear. It was a clear night.

Q. How was the wind?

A. Well, there was no wind; calm; clear.

Q. What did you do after you got down to the place of the collision?

A. Well, I first started to put a line on the "Kern" to see if I could tow her ashore.

Q. Which side did you approach her on?

(Testimony of Joseph O. Church.)

A. I was on her starboard side.

Q. And what did you succeed in doing with her?

A. Well, I didn't do anything; about the time I got the line out she went down, or started down.

Q. Where was the "Elder" at that time?

A. Oh, she was down below there a short distance. I didn't pay much attention to it. I suppose a quarter of a mile, maybe a little more below there.

Q. Did you take any of the crew off of the "Kern"? A. Two men.

Q. What men, do you know?

A. The pilot and mate.

Q. How long have you been engaged in towing rock barges, these rock barges for the Columbia Contract Company, in the river? A. Why, since '98.

Q. How long had it been customary for you to exchange loaded barges for light barges with the steamer "Kern" prior to the collision?

A. Well, with the steamer "Kern," not very long. We had ordinarily been changing them with the other tug.

Q. What was the other tug? [195]

A. The tug "Samson." The "Kern" was in the "Samson's" place, I guess about eight or ten days, something like that. I don't know exactly myself.

Q. And where did you customarily exchange barges, between what points on the river?

A. Well, wherever we would meet.

Mr. DENMAN.—You mean with the "Kern"?

Mr. CAMPBELL.—With the "Kern" and "Samson."

(Testimony of Joseph O. Church.)

A. Wherever we would happen to meet along the river.

Q. Well, between what points was the usual meeting place?

A. Oh, usually between Oak Point and Cooper's Point; usually try to make the run so as to meet in through there.

Q. Why?

A. Oh, because there is deep water and more room; lots of room; and ordinarily there is not much wind around there. It is a good place to change.

Q. When you dropped the loaded barges abreast of Waterford Light, what distance in your judgment was there between the Washington shore and the barges?

A. Well, that would be hard for me to say. I should judge about six or seven hundred feet, probably.

Q. Did you state whether you saw the searchlight of the "Kern" at any time thrown up the river that night before the collision?

A. No. I never saw the searchlight turned up the river; no, sir. That is, after she passed.

Q. Was the searchlight playing when you got down to her?

A. No; it had gone out when I got to her; her lights were all out.

Q. Before you got to her, had you seen the searchlight of the "Kern"? [196] A. No, sir.

Q. What is the usual danger signal blown on the Columbia River? A. Four short whistles.

(Testimony of Joseph O. Church.)

Cross-examination by Mr. DENMAN.

Q. Captain, you say that the "Elder" was coming down at probably full speed, as she usually went?

A. Yes, sir.

Q. That is the usual method of passing up and down that stream at that wide point, isn't it?

A. Yes, sir.

Q. And you had chosen this wide place because there was more room to get out of the way of other vessels in maneuvering and fixing up your tows?

A. Yes, sir.

Q. Because you desired, you aimed to get out of the way of other vessels as much as possible in assembling the barges? A. Yes, sir.

Q. Really lying helpless there in the stream, you can't do anything, can you, in the way of getting out of the way, in assembling the barges?

A. No; no.

Q. The combined length of your tug and your tow, would be a couple of hundred feet, wouldn't it?

A. Oh, yes; yes, more than that.

Q. More than that; so that you aim as much as possible to keep off of the fairway space when you are making those tows? A. Yes, sir.

Q. Now, this danger signal, you know what the rules provide for a danger signal, don't you?

A. Yes, sir. [197]

Q. It doesn't say it shall be four; it says not less than four? A. Not less than four; yes, sir.

Q. Now, you have not attempted to modify these rules on the Columbia River in any way, have you?

(Testimony of Joseph O. Church.)

A. No, no; I don't know that we have.

Q. If you want to call another man down, you might give him five or six, if you wanted to?

A. Yes, sir.

Q. And that would not be out of the way at all?

A. No.

Q. That is correct, isn't it?

A. Yes, that is correct.

Q. About how far is the place where the "Kern" was lying there from Cooper's Point?

A. From Cooper's Point?

Q. Yes. A. About three-quarters of a mile.

Q. That is where she was lying? A. Yes.

Q. The tide had just turned from slack water to flood, had it not, just starting to come in?

A. Yes, sir.

Q. She may have drifted quite a little ways before she sunk, may she not?

A. Well, there wasn't current enough for her to drift far; it was slack water; it hadn't got to flooding much.

Q. Well, it had got to flooding some?

A. Well, not much, if any; I don't think any.

Q. Well, now, why did you say just a moment ago you thought it was flooding some?

A. Well, it was flood tide, yes; but there was so little current [198] the position of the boat would not change very much.

Q. It would some, though? A. No.

Q. It would some?

A. Not much, because the barges never changed

(Testimony of Joseph O. Church.)

the positions in all the time they laid there very much. There is no current in the Columbia River at that place, to speak of.

Q. Oh, there is not?

A. Unless it is a big tide.

Q. So that in your opinion the place where she lay was about the point of the collision?

A. Just about, yes, sir.

Q. Now, where did you say you passed the "Elder"? A. Just below Cooper's Point.

Q. How far below, a thousand feet?

A. No. I don't think so. It might have been, but I could not say.

Q. It was within a thousand feet of Cooper's Point? A. How?

Q. It was within a thousand feet?

A. Yes, inside of a thousand feet.

Q. Of Cooper's Point? A. Yes.

Q. You are certain of that, aren't you?

A. Yes.

Q. Or pretty certain, as well as you can recollect?

A. Yes, sir.

Q. And what happened on that night after losing that tug is pretty well impressed on your mind, isn't it?

A. Well, it is two years' time; a man forgets those things a little bit, you know.

Q. It wasn't a quarter of a mile below Cooper's Point that you [199] passed the "Elder"; it was within a thousand feet of the Point?

A. Well, probably, yes, about; I think so.

(Testimony of Joseph O. Church.)

Q. And you recollect the following testimony before the United States Inspectors?

Mr. CAMPBELL.—What page?

Mr. DENMAN.—Page 85.

Q. (Continuing.) “At that time the ‘Elder’ as she was passing you, signaled the ‘Kern’? A. Yes, sir. Q. By one blast? A. Yes, sir.” Do you recollect that testimony? A. Yes.

Q. So that the first signal from the “Elder” to the “Kern” came when they were about three-quarters of a mile apart? A. Yes.

Q. That is correct, is it?

A. I think so, yes; very near it.

Q. Are you familiar with this rule, number 6 of the Inland Waters Rule, which reads as follows: “When steam vessels are running in the same direction and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle as a signal for such desire, and if the vessel ahead answers with one blast, she shall put her helm to port.” Are you familiar with that rule? A. Yes, sir.

Q. Now, it says here, “If the vessel ahead answers with one blast, she shall put her helm to port.” It is only in the event the vessel ahead answers with one blast that she puts her helm to port when she approaches you; that is correct, is it not?

A. Yes, sir. [200]

Q. There is no modification of that rule, or wasn’t, on the Columbia River, is there? You haven’t modified this rule in any way on the river? A. No, no.

(Testimony of Joseph O. Church.)

Q. As a matter of fact, you could not do it, could you? A. Couldn't modify it, no.

Redirect Examination by Mr. CAMPBELL.

Q. When Mr. Denman asked you if the point of collision with the "Kern" was three-quarters of a mile below the point where the "Elder" passed you, I will ask you whether or not it is your intention to give that with any degree of accuracy?

A. Well, it is only just a kind of a more or less guesswork about that distance. I don't particularly know.

Q. In your best judgment, Captain, how far were you below Cooper's Point when the "Elder" passed you and gave the first signal to the "Kern"?

A. Well, it is pretty hard for me to say; probably a thousand feet, or maybe less.

Q. Now, if the "Kern" drifted at all after the collision, which way would it be, down the river or up the river?

A. Well, I don't think she would drift. If she did, she would likely drift up the river; but I don't believe she would drift any.

Q. Which way would the river current be running?

A. I don't think there was any current, slack water; the flood tide was backing the Columbia current up.

Q. Where were the barges with respect to the position of the "Kern" at the time you got down there?

A. They were towards the Washington shore.

(Testimony of Joseph O. Church.)

Q. Above or below?

A. Well, one was a little above, and the others about abreast of them.

Recross-examination by Mr. DENMAN.

Q. Now, when the "Elder" was three-quarters of a mile—you say it was about three-quarters of a mile when you passed her, somewhere around there?

A. Less than three-quarters of a mile.

Q. Well, more than a half mile, wasn't it,—must have been if it was within a thousand feet of the point? A. Yes.

Q. More than half a mile, wasn't it?

A. Probably more than half a mile.

Q. Now, when these vessels were half a mile apart and the "Elder" asked for permission to pass the "Kern" to her starboard, why should the "Kern" call him down? Wasn't there plenty of time for him to have turned and gone on the starboard side of the "Kern"?

A. I don't know that there was. I don't know why he called him down. I wasn't on it; I was on the other boat.

Q. You can't conceive of any reason, can you?

A. No, I wasn't there. I wasn't in position to see.

Q. I am asking you now as a mariner.

A. How?

Q. I am asking you as a mariner if there was abundance of room for him to pass on his starboard side and they were half a mile apart, there was no reason for him telling him he could not come through there, was there?

(Testimony of Joseph O. Church.)

A. Well, he might have had reasons I don't know about; I don't know anything about it. [202]

Q. Now, presuming there was room to pass,—I am not asking you about this case, but presuming there was room to pass and there was plenty of clear water between the “Kern” and the shore, there was no reason, if they were half a mile apart, for the “Kern” to have called him down, was there?

A. I don't know whether there was or not.

Q. I say, presuming the facts as I am stating them; don't take any others; presuming the facts as I am stating them; they are a half mile apart?

A. Yes.

Q. There is plenty of room to pass on the star-board side; there is no reason for calling down the “Elder” at that point, was there, presuming those facts to be true, was there?

A. Well, evidently there wasn't room, because he rammed him.

The COURT.—Well, answer the hypothetical question.

The WITNESS.—Well, how can I answer it? I don't know whether there was or not. I am not pilot on steamships; and I wasn't on the “Kern.”

Q. Put this problem out of your mind now.

A. Yes.

Q. Presuming you are taking your examination before the Inspectors. A. Yes.

Q. You have taken a number, haven't you?

A. Yes, sir.

Q. All right. Now, presuming you were in that

(Testimony of Joseph O. Church.)

position, and a vessel was eight hundred feet off the Washington shore? A. Yes.

Q. And another vessel is coming down behind a half a mile away. A. Yes. [203]

Q. And asks for permission to pass in those eight hundred feet the starboard side of the other vessel, is there any reason why, if the other vessel is not moving and not crossing into that water, any reason why that vessel should forbid the approaching vessel to pass between her and the shore?

A. Well, I should think—

Q. (Interrupting.) Is there any reason, under those circumstances?

A. Well, there is reason.

Q. What is it?

A. If he kept right head-on and never cut out his green light and kept right head-on for a boat that was lying helpless, there is a reason for calling him down until he shuts out his green light.

Q. Until he shuts out his green light?

A. Yes, sir.

Q. In other words, then, if a vessel is coming straight down the river to you a half mile away?

A. Yes.

Q. A half mile away, and there is plenty of room to maneuver and pass in, you won't give him permission if he shows all his lights?

A. If I am lying helpless, no, I won't.

Q. Why?

A. Because I don't think that he—I am afraid he won't have room, that is all. I would warn him in

(Testimony of Joseph O. Church.)

time that I am helpless. When he is coming down the river, he don't know I am lying helpless.

Q. What difference does it make if you are lying helpless if he has room to pass? [204]

A. It makes considerable difference.

Q. What difference?

A. If am lying there and I am not helpless and he keeps his three lights on me all the time and I am not helpless, I can put my wheel over and get out of the way; but when I am helpless, I can't.

Q. But he is a half mile away now; he has *an* abundant time to get over there. A. Yes.

Q. And you call him down instantly? A. Yes.

Q. Have you a right to do that?

A. I certainly have if I don't think there is a chance for him to pass on.

Q. But if there is eight hundred feet, there is plenty of room to pass, isn't there?

A. Yes; if he takes the room, there is.

Q. If he takes the room; and he is a half mile away, and he says he is going to turn to the right by blowing one whistle, and you say he can't turn to the right by complying with the rule until he gets a responsive whistle—that is correct, isn't it?

A. I think you will find it under some of the rules there that a man must show his light when he blows the whistle.

Q. Is that so? What is the rule?

A. I think you will find it.

Mr. DENMAN.—Is there any such rule?

The WITNESS.—I notice that Captain Edwards

(Testimony of Joseph O. Church.)

jacked me up pretty hard about it one time.

Q. What is that?

A. I know Captain Edwards jacked me up pretty hard one day [205] because I made a statement to that effect.

Q. He did, eh? What was the statement you made?

A. About blowing the whistle when the light wasn't hid; had both lights on and blew the port whistle.

Q. Those were passing signals, weren't they?

A. Yes.

Q. They were not coming up, under this rule, from astern? A. What is the difference?

Q. The difference is the astern rule lays down the rule that you can't—I am arguing to the witness, your Honor; the point I am trying to make is the astern rule as I have read it to you, provides that you can't go from the starboard or port until you get permission, does it not? A. Yes.

Q. And that differs from the passing rule which requires you when passing, coming from opposite directions, to put your helm over as soon as you give the whistle. That is the difference between the two, isn't it? A. Yes.

Q. Now, you are half a mile apart, and ask permission to pass over to the right, and I have got to wait until I get permission from you to pass over to your right? A. Certainly.

Q. What right have you to call me down at that distance before you have given me a chance to turn over to the right by giving me the permission signal?

(Testimony of Joseph O. Church.)

A. I think we have a right to do it all right.

Q. Now, what is that based on?

A. Well, because the rule says you shall not attempt to pass until you get the answer. If the boat ahead don't see fit to let you pass, she answers with an alarm signal. [206]

Q. Oh; then your idea is that although there is plenty of room to pass, that the vessel ahead can hold the vessel astern as long as she pleases; is that it?

A. Yes, they can.

Q. That there is no correlative—

A. (Interrupting.) Until there is room to pass.

Q. Well, I am assuming there is room to pass. Now, there is eight hundred feet.

A. I don't know that there was.

Q. I am presuming that there was eight hundred feet. Now, forget for a moment what you think may have been otherwise. Presuming there was eight hundred feet, there would be room to pass, wouldn't there?

A. Yes. It appears to me there would be.

Q. What?

A. Yes; it appears to me there would be room.

Q. Now, if there is room to pass, abundant room to pass, is it your idea that the vessel ahead can hold the vessel behind until its own sweet will is satisfied; or have you got to let him pass when there is room?

A. No; I think you can hold him if you want to, because as long as he is coming right straight forward, he would be coming right straight for me, and if I was helpless and could not get out of his way,

(Testimony of Joseph O. Church.)

I would be a little bit afraid myself.

Q. That is to say, when you are a half mile apart and he can't get out of your way until you have given him permission to go by blowing your one whistle in response to his? What does it mean when I am behind you, coming down a half mile away, and blow one whistle? What do I mean by that?

A. You are asking for permission to pass. [207]

Mr. FULTON.—Which way?

A. Just merely asking for permission to pass.

Q. Which way?

A. One whistle to pass to the starboard.

Q. To the starboard of the forward vessel?

A. Yes.

Q. Now, what has the other man got to do in response to that before I can move my helm?

A. Well, if he answers with one whistle, why then you can move your helm. But you are supposed to be,—he would not likely, if you were running right straight for him, he would not be liable to answer, if he was helpless.

Q. In a half mile, can't you clear a vessel?

A. I don't know whether you can or not.

Q. That is dead ahead of you?

A. I don't know, sometimes whether they can or not. They don't seem always to do it.

Q. Now, let me ask you, suppose the vessels are in this position a half mile apart. (Counsel illustrating.) A. Yes.

Q. Do you mean to say if I get permission from her to pass that vessel ahead on the starboard side, a half

(Testimony of Joseph O. Church.)

mile away, I can't in that distance, get over and clear her? A. Why, sure, you ought to be able to.

Q. You ought to be able to do it in five hundred feet, ought you not? That is correct, isn't it?

A. Well, five hundred feet; I don't know whether you would or not.

The COURT.—You say five hundred feet is pretty close.

A. I think five hundred feet would be pretty close to the boat ahead, being helpless. [208]

Q. Suppose now, she remains stationary, she is anchored there, and I am five hundred feet behind, and I have got a vessel of the power of the "Elder," do you mean to say that if I am going straight forward, I can't clear her in five hundred feet?

A. I don't say that you can't; no.

Q. Isn't it entirely practical to do it?

A. Yes, it is.

Q. Now, if you can do it in five hundred feet, when a man asks your permission when you are a half mile back here, why shouldn't you give it to him?

A. Well, it depends altogether on the circumstances.

Q. Presuming now there is room to pass?

A. That is all there is to that.

Q. Presuming now there is room to pass?

A. I know they have let me pass many times there. I have let them pass, certainly. That is as near as I can come at it.

Redirect Examination by Mr. CAMPBELL.

Q. Captain, supposing that you had been in charge

(Testimony of Joseph O. Church.)

of the navigation of the "Kern" and after an exchange of the whistles which were exchanged, you saw that the "Elder" had not changed her course, but was still bearing down upon you with all three lights showing,—

Mr. DENMAN.—For how long?

Q. I say, until after the exchange of the four whistles, I will ask you whether or not in your judgment as a navigator there was danger of collision?

A. Why, yes, certainly, there was danger of collision.

Q. What would you do under the circumstances?

A. Well, I would blow him an alarm signal; or if there was [209] any show, I would try to get my boat out of the way; I would try to go ahead and back up or something, to get clear, if I could.

Mr. DENMAN.—Now, in order to make this clear to your Honor, we don't contend that the things that the "Kern" did, according to the testimony, when we were right up on top of her, were causitive matters in the collision at all.

Mr. CAMPBELL.—That is, you admit, Mr. Denman, that the going ahead of the "Kern" wasn't in any way the proximate cause of the collision?

Mr. DENMAN.—If your testimony be true, that you were only going after we got within forty feet of you, if you didn't move until we got right down on you, until we were in forty feet of you, if that supposition you are giving him is true, we don't contend that that is a causitive matter in the collision; it could not be. We were right on top of one another and

(Testimony of Joseph O. Church.)

what a man would do under those circumstances doesn't count.

Mr. CAMPBELL.—I am glad to get that admission in the record. That is all.

Recross-examination by Mr. DENMAN.

Q. You say that after the whistles had been exchanged; by that, you mean after the four-whistle signal had been given? A. Yes.

Q. You say you think there would be danger of collision? A. Yes.

Q. You don't think there is any danger of collision when they are a half a mile away and the "Elder" had just blown one whistle, do you? There was no danger of collision then?

A. Well, it seemed to have been. [210]

Q. I am not asking you that. If you were on the stern of the "Kern" and looking up the river and saw a vessel half a mile off that blew one whistle to you,— A. Yes.

Q. You would not think there was any danger of collision then, would you?

A. Well, I should—

Q. (Interrupting.) Oh, be frank.

A. It don't look like there ought to be; no.

Mr. DENMAN.—No; that is all.

Redirect Examination by Mr. CAMPBELL.

Q. If the "Elder" was coming right straight down behind the "Kern" and had not changed her course to either port or starboard at all until she got within a distance of five hundred feet, in your judgment, could the "Elder" have shifted her course so as to

(Testimony of Joseph O. Church.)

have made certain that a collision would not have taken place with the stern of the "Kern" and any of the port side of the "Elder" from forward aft?

Mr. DENMAN.—I object to that. There is no testimony at all—

Mr. CAMPBELL.—(Interrupting.) No, but it is a hypothetical question just as you have been asking.

Mr. DENMAN.—But it is not a hypothetical question based upon any fact proven in the case.

The COURT.—I will let him answer.

Q. In your judgment, could she when she got in a distance of five hundred feet, shift her course either to the starboard or port so as to have made certain a collision would not have taken place between the stern of the "Kern" and some point on the starboard or port side of the "Elder" from forward aft?
[211]

A. Well, it looks like she ought to have been able to turn clear one way or the other.

Q. In a distance of five hundred feet?

A. Five hundred feet, it looks like she ought to.

Recross-examination by Mr. DENMAN.

Q. Suppose you were on the "Elder" five hundred feet astern of the "Kern" and going to split her if she come straight ahead, could you have maneuvered her so you could not have hit her?

A. I don't know whether I could or not.

Q. Why? A. I never handled a steamship.

Q. Never handled a steamship? A. No.

Q. What do you think about it now?

(Testimony of Joseph O. Church.)

A. I never handled a steamship; I could not answer your question.

The COURT.—He is not an expert on that matter.

The WITNESS.—I am no expert steamship man.

Witness excused.

The COURT.—The court will take a recess now until two o'clock.

(Recess was thereupon taken until two o'clock P. M. of Tuesday, *Feb. 6*, 1912.) [212]

Testimony of George Hale, for Libelant.

Portland, Oregon, Tuesday, *February 5*, 1912,

2 P. M.

GEORGE HALE, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

Mr. Hale, how old are you? A. Thirty-six.

Q. Were you the mate on board the steamer "Hercules" on the night that the "Elder" ran into the "Kern"? A. Yes, sir.

Q. Where was the "Kern"? Where had you passed the "Kern" as you were proceeding down the river with the loaded barges?

A. I don't know just where she was. I had just got up then.

Q. You were not on deck then?

A. No; I had just got up.

Q. What time did you go on deck; rather, where was the "Hercules" when you got on deck?

A. The "Hercules" right—just over near to

(Testimony of George Hale.)

Waterford, Waterford Light.

Q. Above it or below it? A. Above it.

Q. Did you have anything in tow at that time?

A. Three barges.

Q. Which three barges? A. Loaded barges.

Q. Where was the "Kern" at the time that you let go the three loaded barges?

A. She had swung around and started back. We always hold them until she turns around.

Q. And where were the three light barges when you got back to them after dropping the loaded barges? [213]

A. Just by Cooper's Point Light.

Q. Abreast the Cooper's Point Light?

A. Just about there; I could not tell; didn't pay much attention whether above. Wasn't below.

Q. Did you see the "Elder" that night?

A. Yes, sir.

Q. Were any signals exchanged between you and the "Elder"?

A. If I remember rightly she whistled once to pass the "Hercules."

Q. Was any response made by the "Hercules"?

A. Yes, sir.

Q. Whereabouts was the "Hercules" when the "Elder" passed her?

A. Just a little below Cooper's Point Light.

Q. Did you hear any signals given by the "Elder" to the "Daniel Kern"?

A. Heard one whistle.

Q. Did you hear any response? A. Yes, sir.

(Testimony of George Hale.)

Q. By the "Kern"?

A. Heard a danger signal.

Q. How many whistles?

A. Four short whistles.

Q. How soon after the "Elder's" first whistle were the danger whistles given?

A. Well, I couldn't say exactly the time; it was immediately.

Q. How did the lapse of time compare with the usual lapse of time between passing signals?

A. Well, sometimes we don't get a response as fast—as quick as you would at other times, but it was just immediately after that.

Q. Did you hear any other signals given by either the "Elder" or the "Kern"?

A. I heard the "Kern" blow her danger whistle twice. The "Elder" only blew once to my knowledge. I didn't pay no attention. [214]

Q. What were you doing at the time the "Elder" gave her first one whistle?

A. Just went in to our tow—to make up our tow; had our lines out, gotten out our lines.

Q. Had you reached the barges at that time?

A. Sir?

Q. Had you reached the barges at that time?

A. When? When she whistled?

Q. When she whistled to the "Kern"?

A. Just coming into them.

Q. What did you do after that?

A. Well, Captain Church hollered to me to shove

(Testimony of George Hale.)

them out to shoal water and drop the anchor, so I ran forward with the anchor.

Q. Before that, what, if anything, were you doing with your barges between the time you heard the "Elder" give her first whistle and the time of the collision?

A. Well, making fast to them.

Q. Did you succeed in making fast?

A. No, got all my lines out—six lines—didn't have them cinched up.

Q. How did those six lines run?

A. Two headlines by the bow, two tow lines from the forward kevel leading aft and two stern lines.

Q. One line to each barge?

A. No lines on the middle barge. They crossed in there.

Q. Where were the forward kevels with respect to the stem of the "Hercules"?

A. Well, about twelve foot aft the stem, I suppose—fourteen foot. [215]

Q. How soon after you heard the second series of four whistles given by the "Kern" was it when Captain Church told you there had been a collision?

A. That is when it was. Just as soon as he blew the four whistles, he hollered to me, he says, "The steamer is into the 'Kern' down there." He says, "We will get the anchor ready; we will drop the anchor."

Q. What did you do then?

A. I went forward on the barges and told the boys, the crew, to take in the lines—take them in. I

(Testimony of George Hale.)

went forward to get the anchor ready.

Q. What did the "Hercules" do after that?

A. Anchored the barges and went right back there; took Mr. Moran off the "Kern."

Q. How did you find the "Kern" then?

A. She was crossways of the channel.

Q. Heading which way?

A. Heading to the Washington shore; the bow was to the Washington shore.

Q. Where was the "Elder"?

A. The "Elder," she was below.

Q. What did you do after you got down with the "Hercules"?

A. I threw a line to Mr. Moran to put the tow-line on. It was a wire line. I saw she was beginning to settle and I said never mind, and I picked him up. Mr. Anderson jumped overboard. I threw a line to him and got him.

Q. Where did Mr. Moran come aboard your vessel?

A. Right on the starboard bow.

Q. How long have you been working on any of the tugs towing these rock barges? [216]

A. Well, I have worked on them, on the big barges or schooners, I worked on them in 1906, and I have worked all summer long on the "Hercules"—on them.

Q. Where did you—where was the usual place of meeting and exchanging the loaded barges and the light barges?

A. Any place we met except in a narrow place.

(Testimony of George Hale.)

Q. Yes, but between what points on the river did you usually meet?

A. Oh, well, generally anywheres from Oak Point down.

Q. Down to what?

A. Well, down anywheres to Waterford—in there; sometimes we would be way below. Sometimes we wouldn't be up and sometimes we would.

Q. How far below Waterford?

A. Have we been?

Q. Yes.

A. Down to Tenasillihee Island. I have been down that far.

Q. How far is that—how far below Waterford is that?

A. Must be about ten or fifteen miles, I guess.

Q. How did the width of the channel at the place where you dropped the loaded barges this night compare with the average width of the channel between the points where you usually exchanged?

A. Well, of course, it is a pretty wide channel from Waterford clear up there for us—clear up to Oak Point, for that matter—well, to Quinn's anyway, might be a little bit wider above; I don't know what part is the ship's channel itself. [217]

Cross-examination.

Questions by Mr. DENMAN:

Mr. Hale, what did you say your business was?

A. Mate on the "Hercules" then.

Q. And the Captain was whom? A. Sir?

(Testimony of George Hale.)

Q. Who was your Captain—Captain Church?

A. Captain Church.

Q. Captain Church tells us that the “Elder” passed the “Hercules” about a thousand feet from Cooper’s Point. Is that your memory of it?

A. Below Cooper’s Point?

Q. Yes.

A. Well, I couldn’t say according to feet, for I didn’t pay much attention. I was busy then. He has more chance to see than I.

Q. You don’t recollect anything to contradict that?

A. Oh, no.

Q. And these barges were lying—the loaded barges were lying just off Waterford Light?

A. Just above Waterford Light there.

Q. Now, how—you say you passed her there, then you went over to these light barges?

A. Yes, sir.

Q. In shallow water?

A. Well, they was in good water.

Q. What did you mean by shoal water?

A. Well, we shifted her over to shoal water to anchor—get them out of the road when we anchored.

Q. You wanted to get the light barges out of the way?

A. Get them away from there, you know.

Q. Why? [218]

A. To get them out of the channel for things to go up or down—give them more room.

Q. Done to effect the manipulations required to get

(Testimony of George Hale.)

these barges into shape and attach your lines and all that sort of thing?

A. Sometimes it is and sometimes it ain't.

Q. This time you had six lines out, did you?

A. Yes, sir.

Q. How long does it take you to get them out—I mean about?

A. Took us, oh, about—I have been under way in three minutes.

Q. I am not asking what you have been. What did you do that night?

A. I couldn't say that time at all. That is something I can't.

Q. As much as ten minutes?

A. No, I don't think I ever took ten minutes unless the barges were turned around. They were straight in the channel that night.

Q. You anchored, didn't you?

A. Anchored them afterwards; certainly, after they had the collision.

Q. Oh, I see.

A. Don't drop any anchor to land.

Q. Well, as I understand it, though, you wanted to get out of the fairway in making up these barges so as to be in no danger to passing—

A. No, I went to make up our tows.

Q. I see. Then if Captain Moran testified he took his light barges over on the Oregon side of channel to get of the way, he is mistaken?

A. No, I wouldn't say that. We go to pick up our barges. Naturally we are going to leave them out

(Testimony of George Hale.)

of the channel as much [219] as we can—the light barges; if we go over to pick them up, why we keep right on going.

Q. When you say going over, you mean over from the regular traveled route? A. Yes.

Q. Where was it you heard the crash of these two vessels? A. I didn't hear the crash.

Q. Was it a quiet night?

A. Yes, sir, clear night.

Q. Now, your captain testified that the first signal from the "Elder" to the "Kern" was given just as you passed her. You have nothing to contradict that, have you?

A. The signal I heard, the only one I heard was when I—I waited until she got by before I turned on the arc light. We use an arc light for a steamer coming down to us—use our colored lights; just as she got abreast, her bridge abreast of me, I reached up and turned on the arc light.

Q. And about that time this whistle was blown to the "Kern"? A. Yes, sir.

Q. Now, you say you exchange your barges anywhere but in a narrow place on the river?

A. Yes, sir.

Q. Why not in a narrow place?

A. Isn't room in case a steamer comes down.

Q. You want to keep out of the way, then, of the regular line of travel?

A. Certainly; figure on giving to them the channel.

Q. So that your story is that just below Cooper's Point the first whistle came from the "Elder" to

(Testimony of George Hale.)

the "Kern" and that was just as you turned off to go over to these light barges? [220]

A. Well, was headed right up to them; backed right around, turned around and headed upstream.

Q. Right by the point there? A. Yes, sir.

Witness excused. [221]

Testimony of Hans Jensen, for Libelant.

HANS JENSEN, a witness called on behalf of libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

How old are you, Mr. Jensen? A. Thirty-two.

Q. Where do you live? A. Silverton, Oregon.

Q. Silverton, Oregon? A. Yes, sir.

Q. What is your business?

A. Marine engineer.

Q. How long have you held a license as a marine engineer? A. Since March, 1909.

Q. Were you employed on board the steamer "Daniel Kern" at the time she was sunk by the "Elder"? A. Yes, sir.

Q. In what capacity? A. Assistant engineer.

Q. Who was on watch at the time of the collision?

A. I was.

Q. Where were you standing at the time—where were you at the time? A. Of the collision?

Q. Yes. A. At the throttle.

Q. How long had you been on watch prior to the collision? A. Well, about half an hour.

Q. Who did you succeed on watch?

(Testimony of Hans Jensen.)

A. The chief.

Q. What is his name? A. Spaulding.

Q. And did you receive any bells or signals from the bridge of the "Kern" directing you to manipulate the engines? [222] A. Yes, sir.

Q. Prior to the collision? A. Yes, sir.

Q. For some few minutes before you received your first signal what had you been doing with the engines?

A. Well, they had been both going ahead and backing.

Q. What was the steamer doing when you were working ahead and back?

A. Going up to the barges, I think.

Q. When you reached the barges then what did you do with your engine? A. Stopped.

Q. Did you hear any exchange of whistles between the "Daniel Kern" and any other vessel?

A. Yes, sir.

Q. What whistle did you hear?

A. I heard one whistle. It sounded to me as if it was astern of us; then four short blasts from the whistle on our boat and then in a short time one more from a boat outside somewhere; then four more short whistles from our whistle.

Q. What interval of time elapsed between the whistle from the boat outside and your four whistles in both instances?

A. A very short time. I don't remember as to— couldn't say just exactly, because I wasn't paying attention to it. Didn't have a watch with me, but

(Testimony of Hans Jensen.)

it was only a very short time.

Q. How soon—where is your engine-room with respect to the outside of the vessel? Can you show me by referring to this photograph (Libelant's Exhibit 1)?

A. This window here is abreast the engine-room.

Q. Which window counting from the forward part of the cabin? A. The third. [223]

Q. And from the after-end of the boat which is it?

A. The fourth; that is the fiddley there.

Q. What do you mean by the fiddley?

A. It is over the boiler-room; the bulkhead between the boiler-room and the engine-room. And this engine-room opening is, I think, about between the two here.

Q. Between the third and fourth windows counting from the forward end of the cabin and between the—

A. Third and fourth counting from the aft also.

Q. Counting from aft.

Mr. DENMAN.—Pardon me, Mr. Campbell; have you a longitudinal diagram of the “Kern”?

Mr. CAMPBELL.—All that I have is simply the photographs.

Q. At the time or after you heard the exchange of signals between the two steamers, did you receive any signals from the bridge of the “Kern” to the engine-room? A. Yes, sir.

Q. What were they? A. Full speed ahead.

Q. And how long was that after the second series of four whistles were given by the “Kern”?

(Testimony of Hans Jensen.)

A. Well, I don't think it was over five or ten seconds.

Q. What did you do with your engines?

A. Put full speed ahead.

Q. And how long after you put full speed ahead until the collision itself?

A. I don't think it was over fifteen seconds—somewhere between fifteen and thirty. I didn't have a watch and didn't notice it, but as near as I could judge. [224]

Q. Did you make any effort to record it in your engine-room.

A. No, not in case—I didn't then, no, sir.

Q. How many turns, in your judgment, had your engine made between the time you started ahead until the collision came? A. Well, between 50 and 60.

Mr. DENMAN.—Between what?

A. Between 50 and 60 revolutions, I think.

Q. My question was, how many revolutions had your engine itself made from the time you started full speed ahead until the blow from the collision came?

A. From the time I started ahead, you mean?

Q. Yes.

A. Yes, I think it made between 50 and 60 revolutions.

Q. How many?

A. Between 50 and 60 revolutions.

Q. How many revolutions could your engine make a minute?

(Testimony of Hans Jensen.)

A. Seventy—between 70 and 75, I think it would make.

Q. How long did you say your engine was running before the collision?

Mr. DENMAN.—He said fifteen seconds.

A. Well, between—about half a minute—something like that. You see the engine, when you throw on full speed ahead suddenly, why, it revolves faster than it does after it picks up the load.

Q. I see. Well, how did you throw your steam on after you got the signal full speed ahead?

A. Threw full steam on at once.

Q. What kind of a bell did you get directing you to do that?

A. You mean the number—a gong and a jingle.

Q. What did the gong itself mean?

A. Half speed.

Q. And the jingle? A. Full speed.

Q. And how did they come with respect to each other? [225] A. Right together.

Q. How was the steam of your boiler with respect to the usual head of steam that you carried?

A. All we were allowed.

Q. Will you state whether or not your vessel will travel the same distance under 60 revolutions from a stop as it will under 60 revolutions when you are running along?

Mr. DENMAN.—The engine or the vessel?

Q. The vessel. That is to say, if your vessel is stopped and you start your engine full speed ahead and she makes 60 turns, will your vessel travel the

(Testimony of Hans Jensen.)

same distance as she would if the vessel was running and you measured the distance she would make in 60 turns? A. Oh, no, sir.

Q. How many turns of the engine, in your judgment, does it take to get headway on your vessel under the head of steam and the giving of full steam as you did in this case?

A. Well, it would take about—to give it, you mean, full speed?

Q. As you gave the steam?

A. Giving the full speed, well, two minutes, I think—to give it full speed.

Q. I thought you said full steam? I mean not full speed but in order to get headway at all how many revolutions of your engine?

A. Twenty-five revolutions ought to. I have never timed, but I think 25 revolutions ought to give it some way.

Q. Where was the chief engineer's room located with respect to the engine-room? A. Aft.

Q. What means of communication, if any, was there between the engine-room and his room?

A. None, except out on deck. You could go out on deck and [226] into the room.

Q. What did you do after the collision?

A. After the collision the engine began to race and I closed the throttle, because I knew the engine was useless then, and just then the mate came by and hollered, "All hands get on the barge." So I shouted to the oiler and the firemen, who were below, to come on deck and then I went around the fiddley and

(Testimony of Hans Jensen.)

closed the main stop, closed the steam for the main engine—closed the only main engine—I closed that.

Q. You shut the water off from the main engine?

A. Yes, I closed the steam next to the boiler or engine and jumped on the barge.

Q. Which barge did you jump on?

A. I don't know which barge it was.

Q. Where was the barge at the time?

A. The barge was alongside the boat on the port side.

Q. Now, what, if you know, was the cause of the engine racing?

A. I think, as near as I could tell, the shaft—I don't know positive, but I think the shaft was broken or the propeller gone. The only thing—

Q. Did you see it afterwards? A. No, sir.

Cross-examination.

Questions by Mr. DENMAN:

As I understand it, you say up to 25 revolutions you wouldn't get way on or it would take that time to get hold, and from there on her way would develop?

A. Well, it would take 25 to get some way on her.

Q. You wouldn't have full way on then?

A. No. [227]

Q. Your tug was lashed to the barge at that time, wasn't it? A. I don't know.

Q. Where is the—how far is the deck of the "Kern" above the water-line?

A. I don't know that.

Q. Well, is it two feet—three feet?

(Testimony of Hans Jensen.)

A. I think about two feet.

Q. And the engine is below down in the hold, is it not?

A. Yes, sir, but the starting-platform is on a level with the main deck.

Q. What?

A. The starting-platform, where I was standing.

Q. On the main deck? A. Yes, sir.

Q. And you say—where were you in that room, that starting-platform? How large a room is that?

A. About 10x12, I think.

Q. 10x12. What portion of the room were you in?

A. Forward.

Q. Forward, and where was this window that was open?

A. Windows? You mean these windows here?

Q. The window opened from this room outside—wasn't there?

A. Yes, sir, a door opened also, but a gangway—this engine-room—there is a gangway about three feet wide and the engine-room is the inner side of this gangway. These windows are on the outside.

Q. Is the engine-room sealed up where you were, where the starting-platform is? A. Yes, sir.

Q. How did that sound get in there from the outside? A. The door was open. [228]

Q. Where was that door—behind you or alongside you? A. Right by me.

Q. Behind you. Then, any sound that came in from the outside would have to come in through the door behind you?

(Testimony of Hans Jensen.)

A. The windows—two windows also.

Q. Where were they? A. Aft further.

Q. Still further aft? A. Yes.

Q. So the sound that came in would still have to go through those windows and that door which was behind you? That is correct? A. Yes, sir.

Q. Any sound coming from forward would have to come back around and come back up to you through that opening? A whistle outside from a vessel forward of you would have to come around through that opening and up again?

A. I was right by the door.

Q. I thought you said on the starting-platform?

A. Yes, it is right by the door.

Q. I thought you said a gangway in between?

A. Yes, this gangway is open, however, fore and aft.

Q. But you say you were standing in the forward part of the room? A. Yes, sir.

Q. And that the door and windows were back of you in the room toward the stern? A. Yes.

Q. And the sound that came in had to come through the door and these windows, did it not?

A. Yes, sir.

Q. Then the sound necessarily had to come from behind you that [229] came through the doors and windows?

A. Yes, on the side. When you face the throttle you stand facing the—

Q. Yes, but you say you were forward of the door. That is correct?

(Testimony of Hans Jensen.)

A. No, I say at the opening of the door, the door was forward of me. I was in the forward end of the room and the door was forward of me.

Q. You say you were forward of the door—the door was behind you. Whereabouts are the engines on this (Libelant's Exhibit 1)? A. Right here.

Q. That is right where? A. Right in here.

Q. Now, what is the door that you refer to?

A. The door that I have reference to is inside here. There is a gangway here that runs the full length of the ship. It is open at this end and open at that end.

Q. Now, draw—where is this? This is a floor plan that we are looking down on? A. Yes.

Q. Now, you say the engine is about there?

A. Yes.

Q. That is to say in this picture about underneath the bow of this boat?

A. Well, about midships. I could tell if I see the skylight. I can't see the skylight there, so I don't know just exactly.

Q. Now, just mark your engine-room here. As I understand it, this was sheathed on the outside up?

A. Yes, sir. [230]

Q. Then, inside there was another wall?

A. There is the engine-room (drawing on paper).

Q. Now, where were the windows in this outside wall with reference to you? A. One right here.

Q. That is to say, at the point marked "A"?

A. And one about here as near as I can remember.

Q. The point marked "B." A. Yes, sir.

(Testimony of Hans Jensen.)

Q. Now, you were in this inside room which I will mark "X, Y, T, Z." Now, where were the windows and doors in that?

A. Here was the door, here was another window, here was another window. All were open.

Q. Now, where were you standing with reference—you say you were standing forward of the door—the door was aft of you?

A. In the forward part of the room. The door was clear up to this bulkhead here, so I couldn't be forward of it.

Q. So that the sound to come in there would have to pass first through the orifices or openings "A" and "B" on the outside, then through these three openings to the inside?

A. Yes, sir, or through this opening here. This was open aft all the way right out.

Q. You mean to say there was nothing here at all? Wasn't there a bulkhead between that?

A. Yes, here, but not in the gangway.

Q. So it could go in through there in the gangway and around here—so the sound would either have to go up through the gangway here or through there, or through there, or through these openings here?

A. Yes, sir. [231]

Q. And you were inside at the place called "M"?

A. Right here is where I stood. The throttle is right here, the engine is right in here.

Q. Now, from that position could you tell whether or not the whistle that you heard came from the port side on your stern, or from the starboard side on

(Testimony of Hans Jensen.)

your stern? A. No, sir, I couldn't tell.

Q. Might have come from the starboard side and might have come from the port side?

COURT.—Are you going to offer that drawing?

Mr. DENMAN.—Yes, I will offer it.

(Marked Claimant's Exhibit "A.")

Q. Now, I understand that you, just before you got this—you said that just before you got this signal to go ahead full speed you had been backing and filling, had you not?

A. Some time prior to that, yes, sir.

Q. Just before? A. Not immediately.

Q. How long?

A. Well, I don't remember, perhaps three or four minutes.

Q. Had been dead three or four minutes, had you?

A. Yes, sir.

Q. Now, your memory regarding this, of course, was fresher at the time you went before the Inspectors than it is now? A. Yes, sir.

Q. Do you remember stating before the Inspectors: This was the question put to you—page 98—"Well, when was it that the signal to go ahead full speed was given? A. Immediately after the last four of the blasts. Q. Immediately after the last four of the blasts? A. Yes, sir. Q. And then didn't [232] you say that she had been going ahead for thirty seconds? A. About fifteen, sir. Q. Didn't you say at first thirty? A. Well, I think anywhere between fifteen and thirty seconds." You remember that testimony, don't you? A. Yes, sir.

(Testimony of Hans Jensen.)

Q. So your first impression then was fifteen seconds you had been going ahead. That is a quarter of a minute, isn't it? A. Yes, sir.

Mr. CAMPBELL.—He said between fifteen and thirty seconds.

A. Between fifteen and thirty as near as I remember. I didn't have a watch, so couldn't tell.

Q. But that was your impression at that time?

A. My impression was between fifteen and thirty seconds.

Q. Could they have made any way in the water at that time? A. Yes, sir.

Q. How much?

A. The number of feet, you mean?

Q. Yes.

A. That the ship would go forward? Oh, about perhaps twenty feet.

Redirect Examination.

Q. Have you ever experimented with the "Kern" to see just how far she would move forward under these conditions? A. No, sir.

Q. Now, what was there in the roof of the cabin—anything over the engine-room? A. Skylight.

Q. What was the condition of that that evening?

A. That was open.

Q. How wide was this gangway or space between the engine-room wall and the side of the vessel?
[233]

Mr. DENMAN.—He says three feet.

A. I am not sure, but I think between three or four feet, something like that—I have never measured it.

(Testimony of Hans Jensen.)

Q. Was there anything across it to close the after end of the gangway leading past the engine-room?

A. No, sir.

Q. Will you take this pencil and mark upon the photograph here with the figure "E" the point opposite which you think you were standing? (Witness does so.) Between which windows was it? (Witness indicates.)

Q. Were you correct on your direct examination, then, in saying that it was between the third and fourth windows looking aft and the fourth and third counting from forward?

A. No, that is right. That is a mistake—that is a mistake—here is the fiddley, so this must be—there is the stack there coming up. This must be the fiddley—there is the window opposite the fiddley; this must be the engine-room because here is the bulkhead between the engine-room and the fiddley.

Q. The second opening counting from forward aft is opposite the fiddley? A. Yes.

Q. Now, upon the drawing which has been offered in evidence as Claimant's Exhibit "A" I note you have only shown two openings marked "A" and "B." I want to know whether you desire to testify there were only two openings on that side of the vessel—so as to make this record clear. On this drawing which is marked Claimant's Exhibit "A" are shown two openings on the side of the vessel marked "A" and "B." I want to know now whether you want to testify that there were only two openings there of what you desire to testify? [234]

(Testimony of Hans Jensen.)

A. No, there were more.

Q. How did the number of openings, as your recollection goes, compare with the number of openings shown on the photograph "Libelant's Exhibit 1"?

A. The same as marked on the photograph.

Q. What was there forward of the engine-room in the ship? What was forward of the engine-room of the vessel? A. The fiddley, the boiler-room.

Q. What part of the vessel's equipment?

A. You mean the machinery?

Q. Where was the boiler with respect to the engine? A. Forward of the engine.

Recross-examination.

Q. What does she burn? A. Oil.

Q. What kind of burners did she have?

A. S. and P.

Q. Usual type? A. Yes, sir.

Q. You were keeping up full steam at that time?

A. No, sir.

Q. You didn't have full steam on?

A. Oh, we had full steam on, but the burners not going full speed because we were laying still.

Q. Do you cut the burners down when you are laying still only few minutes? A. Certainly.

Q. How were they going—about half?

A. I think so.

Q. There is quite a little noise with half burning, isn't there? A. Not very much. [235]

Q. There is noise? A. Somewhat, yes, sir.

Q. You can hear that clear back to the stern, can't you?

(Testimony of Hans Jensen.)

A. No, sir, not when half speed you couldn't, I don't think.

Q. You can hear them in the engine-room, can't you? A. Yes, a little.

Q. Now, this long passageway that goes from the stern three feet wide, how far was that—how long was that passage back to the stern?

A. About twenty feet, I think.

Q. How long is the vessel over all?

A. I don't know, sir.

Q. Well, take another look. How far is it from "E" to the end of that passageway?

A. You mean feet?

Q. Nearly thirty, isn't it?

A. Well, I wouldn't say. I don't know how long the ship is.

Q. Doesn't it look more than twenty feet to you?

A. No.

Witness excused. [236]

Testimony of Charles W. Spaulding, for Libelant.

CHARLES W. SPAULDING, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

How old are you, Mr. Spaulding? A. Fifty-two.

Q. What is your business?

A. Chief engineer—marine engineer.

Q. Where do you live?

A. 683 Vancouver Avenue, Portland.

Q. Where are you presently employed?

(Testimony of Charles W. Spaulding.)

A. Mr. Kern—Columbia Contract Company.

Q. Have you been in his employ—were you in his employ at the time of the “Elder”—“Kern” collision?

A. Yes, sir.

Q. What vessel were you on?

A. “Daniel Kern”—steamer “Daniel Kern.”

Q. In what capacity?

A. Chief engineer.

Q. Do you remember the collision between the “Kern” and the “Elder”? A. Yes, sir.

Q. Where were you? What was the first intimation that you had that the two vessels were in the vicinity of each other?

A. I was in my room when the first four whistles were blown. I knew that was the danger whistle, of course, but I didn’t get up.

Q. Which vessel blew the first four whistles?

A. I didn’t hear anything but the “Kern’s” whistle. I heard our four whistles.

Q. And how many whistles did you hear from the “Kern”? [237]

A. Two different times—four whistles.

Q. When had you gone off watch?

A. Quarter after twelve left the engine-room.

Q. And where did you go?

A. Went to my room and washed, as usual, and went to bed, but I didn’t go to—

Q. Where was your room located with respect to the engine-room?

A. Right after the engine-room.

Q. On which deck? A. Sir?

(Testimony of Charles W. Spaulding.)

Q. On which deck?

A. Between the hurricane deck and the main deck, right aft the engine-room.

Q. When you heard the first four whistles of the "Elder" what were you doing?

A. I was lying down wide awake in bed. In fact, I had just got into bed.

Q. What had you done between the time that you left the engine-room at 12:15 and the time you heard the first four whistles?

A. From 12:15 to twelve—I usually stick around a little while in the engine-room when I go off watch.

Q. In between 12:15 and the time you heard the first whistles, this particular night what had you done after you left the engine-room at 12:15?

A. Just simply washed and went to bed as usual.

Q. What did you do when you heard the four whistles from the "Kern"?

A. I started to get up, and I said, "Oh, shoot it! I ain't going to go out," and lay down again. Right directly after four more whistles, and then I raised up and sort of sat on the side of the bed; then, if I remember right, there was a succession [238] of whistles and then the crash. Then I got up.

Q. How long after the second four whistles before the crash came?

A. Well, it was right close to it. I couldn't tell how long. It was close—everything was close.

Q. Could you tell anything of the direction—you didn't hear the whistles from the "Elder"?

(Testimony of Charles W. Spaulding.)

A. No, sir, I didn't hear the whistles from the "Elder."

Q. What did you do after you got up?

A. What did I do first?

Q. Yes.

A. The first thing I done was to slide my window open. You see that is the only way I could get in communication with the engine-room. I couldn't go into the dining-room and go around to get in, so I opened my window and stuck my head out and hollered for my assistant to throw the circulator into the bilge—throw the two feed-pumps on the bilge and put on all the pumps. I did this through the window.

Q. The window you hollered through was the window on the side of the cabin?

A. Yes, otherwise I would have to go through the dining-room and through two doors.

Q. When was that in respect to the time of the collision?

A. That was right after the crash I made that effort. Then somebody was pulling bells; I don't know who it was. The mate told me he was the one ringing the bells, but they was ringing the bells, so I ran around, then, to the engine-room to answer those bells. There was no answering going on and I ran without being dressed, to put on my steam, but the assistant had closed the main speed, but the "Elder" had gone through and broke my propelling—broke the shaft, you know. [239]

Q. What do you mean by saying had gone through

(Testimony of Charles W. Spaulding.)

and broke the shaft—what shaft?

A. The main shaft. The “Elder” went through and broke it.

Q. Where does the main shaft lead to?

A. Leads to the propeller.

Q. From what?

A. From the engine. So that put the engine out of commission entirely, so I telephoned back to the pilot-house and says, “She refuses to work. Get busy on something else.” I was talking to the captain, Anderson, I believe—the mate. Then I got busy then saving—doing all I could.

Q. And how soon after the collision did you leave here—when did you leave her?

A. I think I was the last man off here—I think I was. I may not, but I think I was the last man. It is a stand between me and Anderson who left the boat last.

Q. What boat did you go on?

A. In a small boat. The water was up about to my shoe tops and I stepped into a small boat.

Q. What part of the “Kern” did you get off?

A. Midships—not midships, forward, next to the hatches.

Q. Where was that with respect to the gangway forward? A. Forward of the pilot-house.

Q. Did you keep any record of the time that elapsed between the various incidents you have related?

A. No, sir, I didn’t keep no record.

Q. Where was the “Elder” when you saw her?

A. When I saw the “Elder”—when I opened my

(Testimony of Charles W. Spaulding.)

door to leave my room there was the "Elder's" bow right in front of me—looked awful close. It wasn't far from me. [240]

Q. Where was the bow at that time with respect to the "Kern" itself?

A. Right in against—clear up the shaft.

Q. And what part of the vessel does the shaft run through?

A. What part of the vessel—right center. Right from the engine—from the propeller to the wheel.

Cross-examination.

Questions by Mr. DENMAN:

Chief, do you recollect testifying the space of time between the first whistle and the collision might have been as much as two minutes or thereabouts?

A. Oh, no, all close together, very close together. In fact, didn't have much time to do anything, it was so close.

Q. Do you remember being asked before the Commission how long the time was—the Inspectors?

A. Well, one or two minutes, something like that, from the first four whistles to the second four whistles. I should judge maybe it would be two minutes or a minute. Something like that, I don't know for sure. I know it was all close.

Q. It wasn't four whistles, then four whistles immediately. About a minute's time or two minutes in between? A. Sir?

Q. Wasn't four whistles and then four more whistles immediately, but there might have been two

(Testimony of Charles W. Spaulding.)

minutes or a minute's time in between?

A. Might have been a minute, something like that, all close work.

Q. Might have been two minutes you testified before?

A. Might have been two minutes. I can't tell for sure. It was close work.

Witness excused. [241]

Testimony of Arne Arneson, for Libelant.

ARNE ARNESON, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

How old are you, Mr. Arneson?

A. I was 23 last August, the 25th of August.

Q. And what is your business?

A. I used to be a sailor.

Q. Used to be a sailor? A. Yes.

Q. Are you now? A. Yes.

Q. What do you sail on now?

A. On the river—used to be outside.

Q. What boats have you been sailing on recently?

A. I was on the "Meldrum."

Q. On the what?

A. On the "Meldrum" of Astoria.

Q. Who owns it?

A. The Callendar Navigation Company.

Q. Were you on board the steamer "Kern" at the time she was sunk by the "Elder"? A. Yes, sir.

(Testimony of Arne Arneson.)

Q. What were you doing aboard of her—what was your capacity? A. I was a deckhand.

Q. Deckhand. What time did you get up that night? A. Oh, about 12:15.

Q. 12:15, and where was the “Kern” at that time—what was she doing?

A. She was just going up to change tows—change barges.

Q. Which barges did she have in tow when you got up? A. She had the empty ones in tow. [242]

Q. What did she do with the empty barges?

A. Let them go.

Q. And what did you do after you let them go?

A. Was going to turn around and hook onto the loaded ones.

Q. And did you ever reach the loaded ones?

A. What?

Q. Did you ever reach the loaded ones?

A. Which?

Q. Did you get down to the loaded ones?

A. Yes, sir, we got one line aboard.

Q. Now, just describe to us how the “Kern”—before I ask that—which way were the loaded barges headed with respect to the Oregon shore and the Washington shore?

A. Was headed toward the Oregon shore.

Q. Just describe to us how the “Kern” came up to the loaded barges.

A. Well, we was heading downstream and we had the barges kind of on the port bow, the stern barges.

Q. And how were you—what lines were you mak-

(Testimony of Arne Arneson.)

ing fast, if any? A. Port head-line.

Q. And it led from where on the "Kern"?

A. From the port bow.

Q. And where did it lead on the barge?

A. On the stern of the barge.

Q. Which barge? A. Port barge.

Q. Did you hear any signals exchanged between the "Kern" and the "Elder"? A. Yes, sir.

Q. What signals did you hear?

A. The first whistle I heard was one whistle from the "Elder," and the pilot on our boat answered with four whistles—[243] four short blasts. And about—not quite a half a minute afterwards the "Elder" blew one whistle again.

Q. Yes.

A. And our pilot answered with four short blasts.

Q. Now, what lines did you have out when you heard the "Elder's" first whistle?

A. I had the port head-line out.

Q. Had that been made permanently fast?

A. Yes, sir, it was made fast on the scow or on the barge.

Q. Was it cinched up on the "Kern"?

A. No, sir.

Q. What do you mean by having it cinched up?

A. We had it to the gypsy-head and was going to heave in on it and was going to back up—about to swing the barges around to get into them.

Q. What is the gypsy—what do you call the gypsy? A. Head on the winch.

(Testimony of Arne Arneson.)

Q. Did you ever back up to swing the barges in place? A. No.

Q. Now, what did you do after you heard the first whistle from the "Elder" and the first four whistles from the "Kern"?

A. At the time I heard them whistle I was busy with the line—to get that line out on the barge.

Q. What did you do after that?

A. I stood looking at it for a while and the Mate Anderson, he told me not to make it fast yet—to see what he was going to do.

Q. Did you see the "Elder" at that time?

A. Yes, sir.

Q. Where was she? [244]

A. She was above us about half a mile, that is, at the time she blew the first whistles.

Q. When you say above, what position was that with respect to the lines of your vessel?

A. She was exactly downstream—right astern of us.

Q. Right where? A. Right astern of us.

Q. Right astern of you? A. Yes, sir.

Q. And what lights, if any, could you see on the "Elder"?

A. Could see the starboard sidelight and the port sidelight and the masthead light.

Q. Did you continue to watch her after that?

A. What is that?

Q. Did you continue to watch the "Elder" after that?

A. Yes, sir; was looking at it all the time.

(Testimony of Arne Arneson.)

Q. What, if any, change could you see in her lights?

A. Well, when she came close enough to us, that is, after she blowed that second whistle, she kind of swung off to the Washington shore. I could see the masthead light and the port sidelight.

Q. Swinging to which shore?

A. To the Washington shore.

COURT.—Which was that?

Mr. CAMPBELL.—I am speaking now of the “Elder.”

Q. What did you do with your vessel?

A. What was that?

Q. What did you do with your vessel, or what was done with your vessel?

A. I heard the bells, but I couldn't tell what kind of bells it was, but, however, from the way the barges moved I believed [245] we were going ahead.

Q. What makes you think that?

A. Well, because that was the only way—that is my idea—that we could get out of her way.

Q. Which way did your boat move?

A. She moved—that is, she was heading more for the Oregon shore.

Q. For what shore? A. For the Oregon shore.

Q. For the Oregon shore?

A. The Washington shore, I mean.

Q. What did you do—what became of your line when the “Elder” struck the “Kern”?

A. Well, the line run overboard.

Q. You let it go? A. Yes.

(Testimony of Arne Arneson.)

Q. And what kind of a blow was it that the "Elder" gave the "Kern"?

A. Oh, a pretty hard blow, she swung her right square around.

Q. Swung right square around. Was she swung around before the blow? A. No.

Q. What position did the "Elder" come at the "Kern" at the time of the blow?

Mr. DENMAN.—He said from the Washington shore.

A. Well, hit her just the starboard quarter aft.

Q. Which side did you look at the "Elder" as you saw her coming down—which side of the "Kern"?

A. On the starboard side.

Q. On the starboard side? A. Yes, sir.

COURT.—You were on the starboard side, you say?

A. Yes, sir.

COURT.—Handling the lines?

A. I was on the forecastle-head at the time. [246]

Q. Where is the forecastle-head?

A. Forward on the bow.

Q. Part of the bow. How wide was it at the fore-castle-head where you were standing?

A. I don't know exactly how wide it is, but something like, where I was standing—about 12 feet.

Q. About 12 feet. Was the searchlight used that night? A. Yes, sir.

Q. What use was being made of it?

A. She was used on the barges for the men down there to see to make the lines fast.

(Testimony of Arne Arneson.)

Q. How long had you been on the "Kern" prior to the collision—how long had you been working on her? A. That night, do you mean?

Q. How long had you been working on her before the collision—how many days or weeks or months?

A. About twenty days, I think.

Q. During the time that you were on the "Kern" what use had been made of the searchlight?

A. Well, we always used it to make a landing.

Q. Make a landing. Do you know whether or not the searchlight was thrown back up the stream and on to the "Elder" that night?

A. It was not, because we couldn't swing it clear around.

Q. Couldn't swing it clear around? A. No.

Q. Did you hear any bells or signals aboard the "Elder" before the collision?

A. I could hear the telegraph, but I didn't know whether it was backing up or going ahead.

Q. How far away do you think the "Elder" was at that time? A. Oh, about 50 or 75 feet. [247]

Q. And how was she headed with respect to the "Kern"? A. Just about midships.

Cross-examination.

Questions by Mr. CAMPBELL:

You haven't talked this case over with anyone before you came here, have you?

A. Not before yesterday. I was talking it over with the fellows.

Mr. CAMPBELL.—You talked it over with me also, didn't you?

(Testimony of Arne Arneson.)

A. Yes, sir.

Mr. DENMAN.—Now, Mr. Campbell, just leave the witness in my hands, please.

Mr. CAMPBELL.—I don't like the inference contained in a question of that sort. You know very well, Mr. Denman, that the witness has talked this matter over with me.

Mr. DENMAN.—He knows it now. It is perfectly fair in cross-examination to find out what the witness has done without counsel coming in and making suggestions. (To witness.) There is nothing wrong in that. That is entirely proper to talk it over with your counsel all you please.

Q. Now, as I understand it, when the "Elder," finally came to you she was going more off the Washington shore than when you first saw her back down the stream? That is correct, isn't it?

A. She was heading right the same way as we were.

Q. No, I mean when she finally came for you right at the end, she was heading then more around from off the Washington shore, that you testified to, did you? A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. Now, I mean right within the last half minute. She then begun to swing around towards you—hadn't she? [248]

A. Well, she was—that is when she was backing up the bow was to us all the time until she struck.

Q. Now, as I understand it, you were making fast these lines? A. Yes, sir.

(Testimony of Arne Arneson.)

Q. Were you busy making fast the lines when you say you saw the "Elder" behind you, or had you finished making fast?

A. Had two turns around the gypsy-head and was going to start in the winch to heave it tight, and the mate told me to hold on and see what else he was going to do, and she was getting pretty close to us.

Q. Where was the mate standing?

A. He was on the forecastle-head.

Q. On the forecastle-head—what is his name?

A. Anderson—Ed Anderson.

Q. How much slack did you have in that line?

A. Most of the slack was taken up.

Q. Most of the slack was taken up. Did you have ten feet of slack in it? A. No.

Q. Didn't have ten feet of slack? A. No.

Q. Less than that?

A. Oh, about four or five feet.

Q. Four or five feet of slack—that line was broken by the crash, wasn't it?

A. I didn't notice that, I don't think so.

Q. You think it stayed tight to the end, do you?

A. Because I took them turns out of the gypsy-head as soon as she struck.

Q. Well, when she struck was that five feet of slack taken up? A. Yes. [249]

Q. That was taken up. So all the "Kern" had to do was to go ahead five feet to take up that slack. That is correct, isn't it? All she had to do was to go ahead five feet to take up that slack—that was all, wasn't it?

(Testimony of Arne Arneson.)

A. Yes, the bow was up against the starboard barge at the time.

Q. As I understand it, you say the barges were pointed before the collision, square away from the Washington shore—right out to the stream towards the Oregon shore?

A. Not quite crossways, but kind of slanting downstream, but was heading for the Oregon shore.

Q. And you—and your boat had your port bow against them and the stern toward the Washington shore. You made fast by the bow towards the barges and the stern toward the Washington shore.

A. We was heading perfectly downstream.

Q. Perfectly downstream?

A. At the time.

Q. At the time of the collision? A. Yes, sir.

Q. And she struck you in that position and drove you around? A. Yes, sir.

Q. And you say when you first saw the “Elder” she was about half a mile astern of you?

A. She was just about half a mile astern of us.

Q. Then you heard that whistle right then—that first whistle? A. Yes.

Q. And now couldn't that have been three-quarters of a mile?

A. Well, I ain't sure about that. I know she was just abreast Cooper's Point.

Q. And you were right opposite Waterford?

A. Yes, sir. [250]

Q. Now, when you say—speak of these intervals of time, how certain are you that it was thirty sec-

(Testimony of Arne Arneson.)

onds between the time that you first saw that vessel and the time she struck you? Was it thirty seconds or how long?

A. From the time I saw her until she struck?

Q. Yes.

A. Oh, about two minutes—between two and three minutes.

Q. Between two and three minutes between the first whistles—

A. It couldn't be any more between the first whistle until she struck us.

Q. Do I understand that the mate said to you, when this steamer was opposite Cooper's Point, "Look at that fellow; we don't know what he is going to do"?

A. That was after the second whistle was blew.

Q. Then you didn't turn to look until the mate called your attention after the second whistle?

A. I seen the boat from when she blew the first whistle.

Q. But you just said what made you look was the mate calling your attention to it, and up to that time you had been fixing these wraps on the winch. How do you account for that?

A. We had that line out, that is, it was made fast on the barge. That is, after the "Elder" blowed her first whistle and the fellows on the scow made fast, and I took in all the slack I could get by hand, and took two turns a round the gypsy-head; then she blowed her second whistle; then the mate told me to see what them fellows was going to do because she

(Testimony of Arne Arneson.)

was pretty close to us then; then he was running right for our stern.

Q. Running for your stern?

A. Yes, sir.

Q. But you say he seemed to be going more off the Washington shore at that time? [251]

A. No, sir; the way it looked—that is, I was on the starboard of the boat; took the port line across the bow to the starboard side, and took it around the gypsy-head and I was looking out on the starboard side.

Q. Well, you were running right down the regular traveled route at that time—the usual course downstream—your vessel?

A. Well, close to that, I guess.

Redirect Examination.

Q. Mr. Arneson, can you tell accurately the distances on the water at night?

A. Well, pretty close, that is, by the lights on shore—a short distance.

Q. That is, for a short distance you say?

A. Yes, sir.

Recross-examination.

Q. Now, how many turns—how many wraps did you make—what did you do with the line or what were you doing with the line when you first saw the “Elder”?

A. I got the line on the scow; the fellows pulled that line in and I was going to put the eye upon the bitt.

Q. As you were going to put the eye around the bitt

(Testimony of Arne Arneson.)

you saw the "Elder" at that moment?

A. I saw the "Elder's" three lights before I threw out the heaving line.

Q. Then you threw the heaving line down?

A. Yes, sir.

Q. Then it was after you saw the three lights that you heard this first whistle from the "Elder"?

A. Yes, sir.

Witness excused. [252]

Testimony of Albert Crowe, for Libellant.

ALBERT CROWE, a witness called on behalf of libellant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. CAMPBELL:

How old are you, Captain?

A. Fifty-three.

Q. What is your business?

A. Marine surveyor.

Q. What do you mean by marine surveyor?

A. I examine damaged vessels, look after loading, discharging, general care of the ship.

Q. How long have you been engaged in that business? A. Nine years here in Portland.

Q. What had been your business prior to that time? A. Building sailing ships.

Q. How many years experience have you had as ship master? A. Seventeen.

Q. I will ask you whether or not, in your judgment, it is possible to judge distances on the water at night with any degree of accuracy? A. Not very close.

(Testimony of Albert Crowe.)

Q. Did you ever visit the scene of the wreck of the "Kern"?

A. On the 19th day of August; the day following the night of the collision; I went to make an examination of it.

Q. Did you take any bearings at that time for the purpose of locating the position of the wreck?

A. Went right on the wreck—on top of it; took hold of the mast of the wreck, top of the mast—got the location.

Q. Did you take any bearings to show the position?

A. Yes, sir. [253]

Q. Can you locate upon this chart, or have you located upon the chart marked "Libellant's Exhibit 4" the location of the wreck?

A. That is the chart I put the location on.

Q. Now, will you mark upon this chart with the letter "K" the position in which you found the wreck when you took your bearings. (Witness does so.) Where is it with respect to the crossing of the two lines?

A. At the intersection of the two lines.

Q. What bearings did you take, Captain Crowe, from the wreck?

A. I took three sets of cross-bearings. That was the result of the three of them. Two of them were land projections.

Q. Will you mark upon the chart, using the figures 1, 2, 3 and 4—whatever may be necessary to show the land marks which you used in obtaining the bearings?

(Testimony of Albert Crowe.)

A. (Marking.) From the place of the wreck looking toward Eureka the line drawn so it will touch the water and the most southern point of the Washington shore, would lead from the tenth window of the Eureka cannery.

Q. Mark the tenth window as near as you can with the figure 1.

A. That gave me my line over the ship somewhere on that line. To find out where she was on it I took a set of cross-bearings from the Waterford fisheries.

Q. Mark your Waterford fisheries too—mark it 2.

A. (Marking.) Looking right across Wallace Island is a lowering of the hills like a “V” shape; a very clear defined line. We were in a transit line between the Waterford fisheries and the center of this “V” opening formed by the hills.

COURT.—Mark that “V” opening with a 3, please;—I mean formed by the hills. [254]

A. I couldn't do that exactly on that chart. You must look on the ground.

Q. How did you locate the line then running from “K” to “2”?

A. From “K” to “2” by—well, I done it at that time—I done it afterwards when we were lifting the vessel—when *the* had the salvage vessel alongside—in lifting her.

Q. Captain Crowe, did you measure the distance that the “Kern” was off the Washington shore?

A. I took it and marked it on this chart at the time.

Q. What distance was it?

A. The “Kern” was lying 990 feet from the near-

(Testimony of Albert Crowe.)

est Washington shore.

Q. Now, how far was she lying from the Oregon shore?

A. About—from Wallace Island she was pretty near three-quarters of a mile.

Q. Did you take any soundings, Captain, of the water? A. Yes, sir.

Q. What soundings did you find?

A. 68 feet of water.

Q. Where? A. Right at the wreck.

COURT.—Show me the margin of Wallace Island?

A. (Witness indicates.) Between it and the Oregon shore.

COURT.—That was the northern shore of Wallace Island?

A. Yes, sir; the northern shore of Wallace Island.

Q. What depth of water was there, Captain, between the wreck and the Wallace Island shore?

A. I didn't sound that far over. I took that depth around the vicinity in order to see and make plans for my salvage.

COURT.—That chart shows the depth there, doesn't it? A. Yes, sir. [255]

Q. Is that in feet or in fathoms?

A. It is 63 feet.

Q. The figures in the white portion are what?

A. Fathoms.

Q. And the shaded portion is in what?

A. In feet.

Q. Now, Captain, did you have anything to do with the raising of the "Kern"? A. Yes, sir.

(Testimony of Albert Crowe.)

Q. Did you see her when she came to the surface?

A. I was there at intervals through the lifting. I helped to make the plans for the lifting and was down at different days—different times to see how they were getting along.

Q. Were you there when she actually came to the surface?

A. I was there when—no, not when she was altogether up—the last two or three days before she was up.

Q. No, I am asking if you were there when she actually came out of the water?

A. I was there when we had her lifted. I was there first when they had one end up. She had gone down, broken some of the chains; had her partly clear of the bottom for a number of days.

Q. More specifically, were you there when the top of her pilot-house first came up above the water?

A. No, I don't think I was.

Q. Did you see the "Kern" after she was in the drydock? A. Yes, sir.

Q. I hand you a photograph and ask you whether or not that correctly shows the place where the "Elder" cut in to the "Kern"?

A. That shows the place, but it doesn't show it as far in [256] as it went.

Q. How deep was the cut?

A. The cut on the main deck went in within ten inches of the center line, the center fore and aft line of the ship, and on the bottom of the hull, it went into the shaft, went into the second garboard.

(Testimony of Albert Crowe.)

Q. What do you mean by the second garboard?

A. Well, it is the second plank from the ship's body.

Q. Which garboard, the port or starboard?

A. The starboard, until it broke the shaft.

Q. What was the distance of the innermost point of the cut on the main deck from the side of the vessel, the rail?

A. It would be about twelve feet.

Q. About twelve feet, and how far forward, Captain, of the stern of the "Kern" was the innermost cut in the deck?

A. It was on the deck; it would be nearly twenty feet; it was eleven feet forward of the stern post. The overhang—you couldn't measure that exactly, as the whole after part of the vessel was hung and connected to the main body by tackles and chains. At this cut on the side, or right from this cut over to the port side, the whole decks were broken right clear across, and the after end of the vessel was all loose, connected and held to the main body by tackles and chains.

Q. Who put those on? A. The salvors.

Q. How wide was the cut at the guard of the "Kern"?

A. Oh, I think about—the bulwarks were broken and a very wide gap right at the covering board or the guard rail, of [257] the vessel; but in further the cut was clear and well defined; but the timbers were all broke up at the rail, at the outer side of the vessel.

(Testimony of Albert Crowe.)

Q. How was the forward side of the cut? What was the nature of the forward side of the cut?

A. Oh, it was broken, it was ragged, except that nearly in towards the center line of the ship, the cut was very well and clearly defined. The rest was all broken, ragged.

Q. Of what character of timber was the "Kern" constructed? A. Eastern white oak.

The COURT.—She was a wood vessel entirely?

A. She was a wood vessel built out of Virginia oak, but she had been redecked with Oregon fir.

Q. Did she have any copper plating on her?

A. Copper sheeting on her, yes.

Q. What was the size of her frames, Captain?

A. I really do not remember the size of her frames.

Q. Have you any memorandum that would refresh your recollection on that?

A. I may and I may not; I am not sure about that, that I have. At that time, I don't think I kept a record.

Q. In your best judgment, now, what would you say was the size of them?

A. It would be about ten by twelve.

Q. Ten by twelve; and how would they be placed with respect to centers?

A. At that portion of the vessel, it would be about eighteen inches apart from center to center. In the bottom of the vessel she was tight, a close frame.

[258]

Q. The frame you said was white oak?

A. At that portion she was open spaced; but all the

(Testimony of Albert Crowe.)

whole bottom of the "Kern" was framed close like that. You take the planks off and if you had a good pump, you could keep her afloat.

Q. The planking off the outside?

A. Yes. The construction of that vessel was such that if you took the planking off of the bottom, she was so tightly framed, if you had good pumps, I think you could possibly keep her afloat.

Q. How far out from the second garboard did that condition extend?

A. That was all along under the body of the vessel and under the engines, and so on like that.

Q. Was any of that portion of her damaged?

A. Well, no. The open frame space is where the damage occurred.

Q. How many frames were broken, if you know?

A. I really don't recall that. I think there were about five.

Q. Was there any damage on the port side?

A. The port side of the deck, beginning at the last end on this cut made by the "Elder," the deck was broken from that right clear across to the other side. The whole after end of the vessel had wobbled out of line and was held to her main body by tackles and chains.

Q. Have you ever had any experience in salving other vessels damaged in collisions?

A. Quite considerable.

Q. I will ask you whether or not in your judgment, based upon your experience, the steamer "Elder"

(Testimony of Albert Crowe.)

was practically at a standstill [259] at the time of this collision?

A. The "Elder" must have had enormous headway for to carry her in through the white oak timbers, through the big guard rails, covering boards and frames, ceiling, and crashing in right through, and to get in that far, she must have had enormous headway on her.

The COURT.—How many feet did she go in?

A. She went in twelve feet on the side. Rather, more than twelve feet; twelve feet and the thickness of the guards besides. Well, it may have been a few inches one way or the other. The beam of the "Daniel Kern" is twenty-six feet and three inches, I think. Well, at that place, the beam would be diminished a little. She went in within ten inches of the fore and aft center line, consequently she must have gone in about twelve feet, or twelve feet and some two or three inches.

Q. What was the nature of the wood, of the ceiling?

A. The ceiling was principally pitch pine. The clamps, part of the timbers, the deck frame was oak and some of the streaks, the ceilings were oak and some were pitch pine.

Q. What were her deck beams made out of?

A. The deck beams were oak.

Q. Were any of those broken? A. Yes.

Q. What size were they?

A. As near as I could remember those, they would

(Testimony of Albert Crowe.)

be about ten by twelve; perhaps a little larger; they were large beams.

Q. Do you know what the "Elder" had inside of her stem?

A. Inside of her stem? No, I think not.

Q. Did you make any repairs on her prior to this collision at any time before that? [260]

A. No, sir, not before this. Oh, the "Elder." I beg your pardon. I had occasion to go down,—the "Elder" rammed our lower ferry here, cut in through the guards, and while making an examination of the ferry-boat, the bow of the "Elder" was only a few feet away; I asked the chief engineer and the carpenter on the—

Q. (Interrupting.) Well, don't state any conversations that you had at that time. Just go ahead and tell what you did, if anything.

Mr. DENMAN.—You are not going to try this other collision case?

Mr. CAMPBELL.—No, no; but I am leading up to something else very important.

A. I found plates broken right through on the "Elder," and to repair that so that she would not lose any time, at the second frame space back from her stem of the "Elder," I put a bulkhead across, filled that solid with cement right up and down there for a number of feet; and that is what she rammed the "Daniel Kern" with.

Q. Are these models prepared to scale, Captain?

A. They are.

(Testimony of Albert Crowe.)

Cross-examination by Mr. DENMAN.

Q. Did you prepare these models? A. Yes, sir.

Q. This indicates the angle at which they struck, does it not?

A. That was only put in at random. The angle at which the "Elder" entered the "Daniel Kern" was thirty-four degrees abaft the beam, as measured when we got the vessel up. That cut there (indicating) I didn't take the time.

Q. It is approximately the same thing? [261]

A. That is approximately. The break would possibly show a little further aft. Thirty-four degrees is the center of the cut where it was clearly well defined.

Q. Did you ever examine the bow of the "Elder" after this collision?

A. I remember of telephoning Captain Patterson at Astoria, to find out on that occasion about whether there was any damage on her or not. I believe to the best of my recollection now that I did. I don't think that I seen the vessel probably until the next trip or two, and then I don't really know whether I went down and examined her or not; I would not be sure.

Q. When was it that you saw this cement in her?

A. The cement I put in previous to this at the time that she—I could not tell you the date of that until I turn to my books. I could give you the exact date of that from my records.

Q. Where would you expect to find the injuries on the "Elder," on the starboard or port bow, from this collision?

(Testimony of Albert Crowe.)

A. Wedging in there, I would expect to find scratches on both bows.

Q. I mean, but suppose you found serious injuries on one side and not on the other, which side would you expect to find it on?

A. Coming in the way she did.

Q. She was coming around too far square on; it might come either way?

A. The inner part of the cut, say from halfway in to the rail, from that into the center of the vessel, the cut was clean, and you would get pressure from both sides.

Q. Have you been a navigator? A. I have.

Q. A good many years, haven't you? [262]

A. Yes, I have been around the world quite a number of times.

Q. Have handled vessels?

A. I think so. I think my record will establish that part.

Q. Ever handled the "Elder"? A. No.

Q. She is a usual type of steam vessel, isn't she, on these waters?

A. She is not the modern, but she is the usual shaped vessel.

Q. Do you know what her power was?

A. No, I really don't.

Q. She is the type that is operated in and out through the docks of these various ports here, is she not? A. Yes.

Q. How much space would she turn around in?

A. The diameter of the circle, you mean?

(Testimony of Albert Crowe.)

Q. Yes.

A. Well, approximately half a mile.

Q. Half a mile. Suppose you put her helm hard aport when she is going full speed ahead, how much would she turn in five hundred feet to starboard?

A. Turn not very much.

Q. How much?

A. Hard astarboard or hard aport either one, going at her full rate of speed in going five hundred feet, it would not change more than fifteen or twenty degrees.

The COURT.—How much?

A. About, I should say, fifteen; not to exceed twenty degrees; not going fourteen knots of speed.

Q. That is about two points?

A. Twenty-two. [263]

Q. About two points she would swing?

A. Fifteen or twenty degrees,—less than two points.

Q. Now, she would swing, of course much more—

A. (Interrupting.) After you get headway on her.

Q. Yes. A. You get her once swinging.

Q. The second five hundred feet, she would go a good deal more?

A. Yes, she would go a good deal more.

Q. Suppose you were half a mile astern of a vessel pointing straight down the stream ahead of you, and there was eight hundred feet of clearance between the starboard side of that vessel and the shore,

(Testimony of Albert Crowe.)

could you send your vessel over enough in the half mile to clear the other vessel? A. Could I?

Q. Yes. A. I could, yes, sir.

Q. Would you have any difficulty about it in a half mile?

A. I would not but it would depend on—

Q. (Interrupting.) I am presuming now—

A. (Interrupting.) No, there would be no difficulty.

Q. No difficulty at all?

A. In a half mile, no.

Q. Would you in five hundred feet, have any difficulty?

A. Yes, you would have lots of difficulty.

Q. Why, you say she would swing twenty-two?

A. She would swing fifteen to twenty degrees in going it.

Q. All right; now, how many feet would that swing her over— A. In five hundred feet?

Q. Yes.

A. That is pretty nice calculation. I would have to go to [264] work and do it; not in my head, I couldn't do it.

Q. She would easily swing a hundred feet to her starboard in running five hundred feet with her helm hard aport?

A. Not at all; she wouldn't swing nothing like a hundred feet.

Q. She would not? As a navigator, you are willing to go on record? A. I surely am.

Q. How many feet would she swing?

(Testimony of Albert Crowe.)

A. Probably thirty or forty feet.

Q. Probably thirty or forty feet?

A. Depending on the class of vessel, whether she is fine lined; whether she answers her helm. There is an awful lot of difference in the vessel. Some vessels would not move at all; other ones would take a good little. It would depend a great deal on the vessel.

Q. So the man who knows the vessel is the real authority on that?

A. The man that knows his vessel knows better than anybody else; the man that has been there and been controlling her, he knows that better than an outsider.

Q. Now, working in or out of these rivers, of course you do have to pass under those circumstances. You get up in five hundred feet of a vessel very often and have to pass one side or the other, don't you?

A. Oh, yes; sure.

Q. The difference between a thousand feet and five hundred feet is a great deal, because you get going in the first five hundred feet and in the second you get going a good deal, don't you?

A. Yes, sir. [265]

Redirect Examination by Mr. CAMPBELL.

Q. Just to clear up this model, Captain, I want to ask you whether or not the forward side of the cut made in the small model is intended to represent the angle of the forward side of the cut as it actually existed in the "Kern"?

A. No, it is not. The cut was just made in there

(Testimony of Albert Crowe.)

at random. As I measured the cut in the "Daniel Kern," the center of the inner part of that was well defined and clear. Following that out, it gave me an angle of thirty-four degrees that the "Elder" entered the "Daniel Kern" at thirty-four degrees abaft the beam. That was carefully measured.

The COURT.—I see on the model a line marked clear across the model. Does that indicate where the boat was broken in two?

Q. What does the pencil-mark across from the inner part of the cut to the port side indicate?

A. Yes, sir, that was just to represent where she was broken across.

Mr. CAMPBELL.—That is all.

Recross-examination by Mr. DENMAN.

Q. By the way, have you not seen, Captain, vessels approaching a dock in San Francisco harbor, say where the timbers are very often twenty-four inches in thickness, at a speed of two or three knots, moving in and crash right in and cut through those timbers and cut in fifteen or twenty feet into the dock?

A. All owing to what weight and momentum is behind them.

Q. Yes, but at a speed of two or three knots. You have seen that, haven't you? [266]

A. No.

Q. Haven't you seen these liners being operated by a tug where there has been a slip in the calculations and the tug take her in and jambs clean in fifteen or twenty feet?

A. If there is a big weight in motion, take a great

(Testimony of Albert Crowe.)

big steamship and say she has ten thousand tons of cargo in her, and her speed is two or three knots, then when she hit, she may go in a good deal more than two or three feet.

Q. Yes, and crash timbers a great deal bigger than on those ships?

A. Yes. We have had them here in Portland. I have one in mind now, that the pilot thought he had her nearly dead, on the east side of the river here, and she went in through the piling, stringers, railroad track and everything else, when he thought he had her practically stopped. It is the weight.

The COURT.—What was her weight?

A. She had six thousand tons of railroad iron and the vessel herself would weigh about four thousand or four thousand five hundred tons.

Q. What was her length, do you know?

A. Beg pardon.

Q. How big a vessel?

A. Oh, the vessel was about three hundred and seventy-five feet long.

Q. A sharp vessel or round?

A. A modern tramp.

Q. The sharper the vessel of course—

A. (Interrupting.) The sharper in going into wood, she will cut further. [267]

Q. As I understand, this bow of the “Elder” was quite sharp?

A. Yes, sir, the bow of the “Elder” was quite sharp.

Q. Then when you say its momentum, that does the

(Testimony of Albert Crowe.)

cutting, is it not? A. Yes, sir.

Q. And that is especially true where the vessel is as this vessel was, up against heavy barges?

A. I don't understand that at the time of the impact that she was against the barge.

Q. Oh, well, that is the testimony here.

Mr. CAMPBELL.—Is that the testimony, Mr. Denman?

Mr. DENMAN.—What is that?

Mr. CAMPBELL.—As I understand, she pushed her right ahead and shoved the barges around.

Mr. FULTON.—You were trying to show damage on the port side.

Mr. CAMPBELL.—By being pushed against the barges. But the evidence does not show at the time she struck she was up against the barges.

Mr. DENMAN.—But there is no evidence to show the cut was made at the time she hit, or when she shoved into the barges.

The WITNESS.—My understanding of the cut is when the "Daniel Kern" was laying near the stern of the port barge, but not up against it.

Q. (By Mr. DENMAN.) I see; but if the situation was this, that the "Elder" was coming along, say four or five knots, three or four knots, and she strikes the "Kern" and pushes it up against the barges and then keeps on pressing it, she would cut in, wouldn't she? [268]

A. Not after he hits it. She would do more cutting with the momentum that hits.

Q. The momentum keeps on. Suppose she strikes

(Testimony of Albert Crowe.)

a vessel in the water and shoves it on ahead of her into the shore? A. Yes, sir.

Q. And then she keeps on going, she will keep the momentum, wouldn't she?

A. The result of shoving the "Daniel Kern" ahead, was she hit the port side of the "Kern" against the rock barges and broke the deck off. That was what was done after the hit.

Q. How can you tell it was after the hit or when it was just shoving her ahead?

A. Because the injury will be a cut at that time. It will not be a break. And the break is from tension being put on the hull of the vessel, and we arrived at that by running against the barge afterwards, after the impact.

Q. How can you tell that? How can you tell whether or not—

A. (Interrupting.) I am drawing that conclusion, because there is no other way we could arrive at it. As the "Elder" hits the "Daniel Kern" with her sharp bow, we will say, considering it was sharp, she cut in through the side. Now, if she had momentum enough and there was nothing on the other side of her, she would have gone right clear through her; but that is not the case. She cut into the thin inches, in the center line. The evidence as we have it in this break, is there had to be something that created a tension on this. That would break the rest of the deck from the center line across to the port side, the hitting; I presume—this is a supposition, that she hit the

(Testimony of Albert Crowe.)

port barge,—then it was very easy for her to break it off. [269]

Q. Now, suppose she hadn't broken off at all; suppose her position is that (illustrating with model) and she comes along and strikes like that the "Daniel Kern." (Illustrating.)

A. Certainly, a light vessel.

Q. What is her tonnage?

A. She was made out of white oak.

Q. What is her tonnage?

A. Oh, I really don't know what it is now, I could not answer that.

Q. Approximately?

A. About three hundred and sixty or four hundred tons.

Q. What is the tonnage of this vessel?

A. About fourteen or fifteen hundred tons. I can tell you in a minute. (Witness refers to memorandum). The "Daniel Kern" is four hundred and fifty tons gross measurement; and I would say that the "Elder" was fourteen hundred tons.

Q. Your estimate here was given on the basis of fourteen hundred; that is your original estimate?

A. That was just roughly. I think she is greater in her gross tonnage.

Q. What is her gross tonnage?

A. I don't know.

Q. Now, isn't it over three thousand?

A. No. I don't think it is three thousand at all.

Mr. CAMPBELL.—Did you obtain that from Lloyds Register?

(Testimony of Albert Crowe.)

A. Yes, sir; or the United States list. I don't think her tonnage is three thousand gross.

Q. What would you estimate she was drawing at that time? A. What?

Q. The "Elder"? [270]

A. Probably fifteen feet.

Q. Fifteen feet? A. Ten or fifteen feet.

Q. And you estimate she was somewhere around fifteen hundred tons in gross tonnage?

A. No, no, not tonnage.

Q. Gross tonnage is what she hits with, isn't it?

A. Oh, yes; she hits with both.

Q. I mean to say, when you are speaking of momentum you don't mean to take the small figures; you take the gross tonnage, don't you?

A. We must either talk in reference to gross or the net.

Q. That is what I want you to do.

A. And as we take the "Daniel Kern," we have her gross tonnage four hundred and fifty; it is a usual thing with a steamer that the gross tonnage is about two and a half times the net.

Q. What is the net tonnage of the "Kern"?

A. I don't know. I have got the gross tonnage of the "Kern" here on my reports.

Mr. FULTON.—What did you say your gross tonnage was?

A. Gross tonnage of the "Daniel Kern" four hundred and fifty tons, gross measurement.

Q. Now, when you were speaking of the "Elder" as being fifteen hundred tons gross, that was the es-

(Testimony of Albert Crowe.)

imate you had in mind in speaking of this impact?

A. Oh, no, not the weight. Weight is quite a different thing. No; measurement tons are not weight tons, in an impact.

Q. What was the amount of tonnage behind, the weight tons behind the "Elder" when she struck the "Kern"? A. I could not tell you that. [271]

Q. You don't know that?

A. I really don't know what cargo she had in her.

Q. You don't know that?

A. I don't know that.

Q. May I see your report?

(Witness here passed said report to counsel.)

Redirect Examination by Mr. CAMPBELL.

Q. Captain, I will ask you whether or not in your judgment there would have been any difference in the depth of penetration into the "Kern" if she had been standing still instead of moving at the time of the actual impact?

A. The depth of the cut would be less.

The COURT.—That is, moving away from the "Elder"?

A. Moving away from the "Elder," yes, sir.

Recross-examination by Mr. DENMAN.

Q. She was really moving across the bows of the "Elder," wasn't she?

A. She must have been moving in that direction.

Q. Yes; across the bow though, rather than—

A. (Interrupting.) No; at thirty-four degrees, the cut showed thirty-four degrees; now she was going away in that same line.

(Testimony of Albert Crowe.)

Q. But as I understand it, that is fifty-six degrees from parallel? A. Yes.

Q. So she was nearer at right angles, than she was parallel?

A. This will show exactly. (Referring to model.) As the "Elder" was coming there. Now, as she is going away, she will tend to decrease the impact. [272]

Q. She does not go sideways, does she, Captain?

A. No, she doesn't go sideways.

Q. You pushed her that way (indicating).

Mr. CAMPBELL.—Let him manipulate the models.

The WITNESS.—Before she hit. To the best of my ability to place this wreck, the "Kern" was—

Mr. DENMAN. — (Interrupting.) Now, you weren't there, were you, Captain?

A. No, I wasn't there, but I think that is the way this vessel was; and when he started to go ahead of course—

The COURT. — (Interrupting.) That is, the "Kern"?

A. The "Kern," he would go this way; his propeller would throw her stern that way (illustrating).

Q. Let me ask you, would she go that way?

A. She goes ahead. She would go nearly ahead, but throwing the stern to port, the bow to starboard as she started.

Q. She would go nearly ahead but would throw—

A. (Interrupting.) She would go nearly ahead,

(Testimony of Albert Crowe.)

but the stern would go to port and the bow to star-board.

The COURT.—That is, the stern would be moving away from the “Elder” faster than the bow of the “Kern”?

A. Yes, sir. The motion of the propeller starting would throw her that way.

Q. That is very slight, though, in the beginning, isn't it?

A. Well, at the start it is quicker and more than it is afterwards.

Q. I know, but in the beginning, it is very little, any way?

A. You use that manoeuver to turn a vessel around with.

Q. I know, if you keep it up long enough. [273]

A. Well, the very first motion of the propeller, the action throws the stern to port.

Q. That is especially true if the bow is over so the bow can turn? A. Yes, sir.

Mr. DENMAN.—That is all.

Mr. WOOD.—Wait a minute. I would like to ask a question, with leave of counsel. I think you made the witness really your witness on this point.

Redirect Examination by Mr. WOOD.

Q. You were asked, Captain, about how far a vessel would swing in a distance of five hundred feet; on what rate of speed did you suppose your answer to be made?

A. It was assuming she was going full speed.

Q. Yes, but what mileage or knots per hour?

(Testimony of Albert Crowe.)

A. Well, in reference to the "Elder," that was fourteen knots.

Q. Well, now at that rate of speed, or even, we will cut it down to twelve knots, how much time would it take to pass over that five hundred feet?

A. A little over a half a minute.

Q. Well, then, did your answer suppose that the helm had been set at the five hundred feet and the swinging begun, or that five hundred feet away, the whole maneuver was commenced, the helm to be set?

A. That the maneuver was commenced that five hundred feet away, that my judgment would be that she could not possibly swing more than thirty to forty feet.

Q. Now, suppose at five hundred feet away, they just commenced to maneuver? [274]

A. That is what I said.

Q. No; I thought he said that the maneuver was already begun at five hundred feet.

A. At five hundred feet, you begin to put the wheel over. The helm man, when he gets an order, puts his helm hard over at five hundred feet away. Then I don't think a lot of vessels wouldn't move hardly anything; others, they would answer the helm very quick, would go thirty or forty feet swung over; but she would have to be very quick answering her helm.

Mr. DENMAN.—Were you ever master of a steam vessel? A. No.

Mr. WOOD.—Just a minute. I hadn't got through, Mr. Denman.

Q. Do you mean that the bow would make that

(Testimony of Albert Crowe.)

swing, or that the whole vessel would pass?

A. The bow.

Q. Just the bow? A. Just the bow, yes.

Q. Now, how long would it ordinarily take after getting the signal to set the helm over?

A. To get it hard over?

Q. Yes.

A. You couldn't get it over,—well, yes. It is all owing to whether he has hand gear or steam gear.

Q. Say hand gear? A. Hand gear?

Q. Yes.

A. It is all according to the strength of the man. With a very strong powerful man, he likely would. That would depend something on how hard the wheel would work, too.

Q. According to that, if he commenced the maneuver at five hundred feet, you would not even have your helm hard over [275] before you passed the distance of five hundred feet? A. That is right.

Q. So you have got to consider that, too, haven't you? A. Yes, sir.

Q. Now, they asked you about this cut in the "Kern" and there seemed to be an impression given in the record that momentum or weight was what did it.

Mr. DENMAN.—With a sharp bow.

Q. With a sharp bow. As a matter of fact, the force of any body striking or having an impact with any other body is made up always of two factors, isn't it, weight and velocity?

A. Velocity.

(Testimony of Albert Crowe.)

Q. Weight and velocity?

A. And velocity together.

Q. For example, a ton cannon ball, at the height of its trajectory or initial velocity, from the mouth of a gun, would go through a great deal greater distance than even a vessel, wouldn't it? A. Yes, sir.

Q. That is, because it has got a superior velocity?

A. Superior velocity.

Q. So a slow-moving mass would go more on account of its weight? A. Yes, sir.

Q. But the whole thing has to be determined by—

A. (Interrupting.) The velocity.

Q. By velocity and weight taken together?

A. Yes, that is right.

Recross-examination by Mr. DENMAN.

Q. Now, Captain, you were a sailing vessel captain, weren't you?

A. As master; I was always master of sailing vessels, wood and steel. [276]

Q. What is that? A. Wood and steel.

Q. You don't pretend to stand as an expert here on the handling of steam vessels, do you?

A. I have been a good deal on steam vessels.

Q. As master?

A. Not as master; I told you that before.

Q. You say you have been a good deal, what do you mean by that?

A. I have been passenger and on business, been up and down the river in my calling. I am down superintending the work for which I am paid and the purpose which I am here for, going down to Astoria

(Testimony of Albert Crowe.)

many, many times during the year.

Q. For the Underwriters, aren't you?

A. Yes, sir.

Q. The Underwriters are interested in this case, aren't they?

A. I believe the Underwriters are interested in both of these vessels.

Q. You have had a good deal of correspondence with the Underwriters about this case, haven't you?

Mr. WOOD.—We object to that.

Mr. DENMAN.—If they are interested in the case and they have corresponded with their agents regarding the case, that is certainly pertinent.

Mr. WOOD.—The Underwriters are not on record in this case. As a matter of fact, it is an Underwriter's fight on both sides but it does not appear so in the record. I can't see how correspondence between this witness and anybody he may represent would be relevant.

Mr. DENMAN.—But if this man has written to anybody any statements concerning this, we are entitled to see them. [277]

The COURT.—Well, you may ask the question. Objection overruled.

Q. You have had a good deal of correspondence, haven't you, with the Underwriters, about this case?

A. I have given them a copy of that report.

Q. You have had a good deal of correspondence with the Underwriters on this case, haven't you?

A. I would not say a great deal. I have given them information.

(Testimony of Albert Crowe.)

Q. And you have written letters to them, haven't you?

A. I have written one letter at any rate.

Q. Where is that letter?

A. Probably in San Francisco.

Q. Where is the letter-press copy of it?

A. I have copies of all my correspondence down in my office.

Q. How many letters have you written in all regarding this case?

A. Oh, that would be very difficult, I couldn't answer that, it is so long ago, whether I have written one or three or four. I could not tell you; I would not begin to attempt to tell you.

Q. You have a copy-book you put those in?

A. I have a copy-book.

Q. That is, a wet leaf copy? A. No.

Q. How do you do it?

A. These are carbon copies (indicating); and I usually make five or six of them.

Q. I am speaking of letters now, not reports.

A. Well, letters too. If I have business where there are two or three insurance companies, wherever I knew there are two or three different companies, in making my report, I will make probably two or three copies. [278]

Q. You can get those letters you have copies of here for me can you?

A. I have copies of all the correspondence that I have had.

(Testimony of Albert Crowe.)

Q. Will you bring them here to-morrow for me, please? A. I will.

Mr. DENMAN.—All right. Thank you.

Mr. CAMPBELL.—If the Court please, we object to any demand upon this witness to produce the letter between him and some insurance company in San Francisco. Now, as a matter of fact, one insurance company is partially interested in the outcome of this litigation, but the Columbia Contract Company here is far more materially interested in it, and how can any letter which this man has written to an insurance company in San Francisco, or the San Francisco board of Marine Underwriters, be binding upon the Columbia Contract Company?

Mr. DENMAN.—I am not arguing this as the admission of one of the parties. I am asking for these letters. This man has written about this occurrence—

The COURT.—(Interrupting.) I think you have a right to inquire—

Mr. DENMAN.—(Interrupting.) About what he said about it.

The COURT.—No, I don't think you can go that far. I think you have a right to inquire whether or not this witness has corresponded concerning this matter with other parties, but when you have done that, then I think you have gone far enough. I don't think you can get those letters now and prove by those letters statements that he made, or show what the correspondence was. I think that is a collateral issue. [279]

(Testimony of Albert Crowe.)

Mr. WOOD.—I would like to ask a question that may help this argument a moment: Who employed you to go down there?

A. Mr. Henry Hewitt.

Mr. WOOD.—To go down to the wreck?

A. This report is the best evidence itself. It tells who sent me there.

Mr. CAMPBELL.—Mr. Henry Hewitt, of the San Francisco Board of Marine Underwriters?

A. Yes.

Mr. CAMPBELL.—Who paid you, Mr. Crowe?

A. Mr. Daniel Kern.

Mr. WOOD.—Who first told you to go down?

A. Mr. Henry Hewitt, I think, gave me my first instructions, or he and Mr. Kern together were consulting together and with myself, and I went down to get at the facts as near as possible and as quick as possible, concerning this wreck.

Mr. WOOD.—And you were paid by Mr. Kern?

A. I was paid by Mr. Kern, nobody else.

Mr. WOOD.—I have been under the impression, as I stated in the beginning, and I claim that this stands of record as the suit of the Columbia Contract Company and that we employed and paid this witness and we would object to his correspondence with other people brought in to affect our rights.

Mr. DENMAN.—I will offer to show, your Honor, that the Underwriters have had subrogated to them an interest in the vessel and in the suit and that they are in fact either coprincipals with these parties or under contractual relationship, which makes them

(Testimony of Albert Crowe.)

identical as far as the employment of this man is concerned. [280]

Mr. CAMPBELL.—If the Court please, I don't deny that. As a matter of fact, this vessel was insured with a Firemen's Fund Insurance Company and the Firemen's Fund Insurance Company paid a loss on this I think before the wreck was raised, settled with Mr. Kern. My impression is that the amount that they settled for exceeded the amount of the actual damages in the case. This man, I think—Captain, don't you represent the San Francisco Board of Marine Underwriters?

A. Yes, sir.

Mr. CAMPBELL.—And is the Firemen's Fund Insurance Company a member of that board?

A. They are one of the largest members.

Mr. CAMPBELL.—Do you know whether the Thames & Mersey is one of the members of that board?

A. Yes.

Q. Do you know whether the Switzerland is a member of that board?

A. Yes, the Switzerland Marine.

Q. Do you know who represents in San Francisco, the Switzerland and Thames & Mersey?

A. Yes, Louis Rosenthal.

Q. Do you know anything about the insurance on the "Elder"?

Mr. DENMAN.—Of your own knowledge?

A. No, not on the "Elder," I don't know. I will tell you—strike that out.

(Testimony of Albert Crowe.)

Mr. FULTON.—Of your own knowledge, you are to testify.

The WITNESS.—I know from Mr. Louis Rosenthal that the—

Mr. DENMAN.—(Interrupting.) Well, I object to that.

The WITNESS.—That he, acting for— [281]

Mr. CAMPBELL.—Wait a minute. I think, if the Court please, with equal fairness, Mr. Denman who is here, as I am, from San Francisco, should state who is employing him and should state what company he is representing here.

Mr. DENMAN.—I was employed by Mr. Doe, who came to my office—he telephoned to me and sent Mr. Ozauf to my office to retain me in this case before it was brought and now I have had an admission on the part of the other side that there is a subrogated interest in the suit. As a matter of fact, the entire suit has been subrogated to the insurance company. They are the real parties in interest here. And here is correspondence between this man who was employed by them through Mr. Kern and had correspondence with them.

The COURT.—All you are asking for now is—the reason you are asking for his correspondence with these other parties is, as I understand it, it goes to the credibility of this witness?

Mr. DENMAN.—Yes.

The COURT.—Showing the interest that he has in this affair. Now, when you have shown that he has corresponded with these people, isn't that going far

(Testimony of Albert Crowe.)

enough with this? Isn't the rest of it a collateral issue?

Mr. WOOD.—I would like to have this on the record too. That while Mr. Campbell and I are together, I represent a different claim. I represent the Columbia Contract Company and he only has a partial interest, and the Columbia Contract Company has got the large and principal interest still remaining to it, and I object to our witness, our men whom we employed and paid, being called upon to bring in correspondence with other people. Or if he is not our man, if he is [282] the other people's man, I still object to it. I don't think the correspondence has any relevancy or materiality here.

Mr. CAMPBELL.—If the Court please, I would like to ask Mr. Denman whether he has not discussed the liability of the "Elder" with any Underwriter in San Francisco?

The COURT.—I don't think that is a proper—

Mr. CAMPBELL.—(Interrupting.) He is injecting into it a spirit of unfairness, and I would like to ask him.

Mr. DENMAN.—Oh, why, Heavens.

The COURT.—I will sustain the objection, and that will put an end to it.

Witness excused. [283]

Testimony of Daniel Kern, for Libelant (Recalled).

DANIEL KERN, was thereupon recalled on behalf of libelant and further testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Mr. Kern, is there any reason that you have for

(Testimony of Daniel Kern.)

having the steamer "Hercules" and the steamer "Daniel Kern" exchange light for loaded and loaded for light barges on the Columbia River?

A. Yes, sir.

Q. What reason is that?

A. On account of the shallow water above the mouth of the Willamette and we have to use a light draft boat on the upper end and this light draft boat isn't allowed to go any further than Astoria. The inspectors don't allow these shallow boats to go to Ft. Stevens, where we deliver the rock, and therefore we have to use a deep draft boat on the other end and a light draft boat on this end.

Q. How long have you been engaged in transporting rock to the jetty by means of these barges and tugs?

A. Well, we started in with it about 1898; we haven't worked at it steady all the time, and not altogether to this jetty; we built a jetty at Gray's Harbor. We towed the rock the same way.

Cross-examination waived.

Witness excused. [284]

**Testimony of Charles W. Spaulding, for Libelant
(Recalled).**

CHARLES W. SPAULDING, was thereupon recalled on behalf of the libelant and further testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. I hand you Libelant's Exhibit 8, Mr. Spaulding, and ask you who took the photograph?

A. I did.

(Testimony of Charles W. Spaulding.)

Q. I want to ask you whether or not that shows the position of the searchlight as the searchlight came out of the water when the vessel was raised?

A. Yes, sir. I stood there with my camera and took it when she came out of the water as you see it there.

Mr. CAMPBELL.—That is all.

Mr. DENMAN.—There is no question about the searchlight.

Mr. CAMPBELL.—You allege in your answer the searchlight was thrown in the face of the “Elder.”

Mr. DENMAN.—It had no causative effect. The same things were done whether the searchlight was thrown or not.

Mr. CAMPBELL.—Well, we have got to meet the defenses that are made.

Mr. DENMAN.—I know, but I am telling you now there is no question about that.

Witness excused.

Mr. CAMPBELL.—Now, if the Court please, with the exception of the element of damages, which apparently, with the time we are occupying with this case, we will be unable to hear before you go to San Francisco, which I understand will be [285] referred to a commissioner, that concludes our case with the exception of one witness, the mate, Henry Anderson, who is an officer aboard a steamer running from Tillamook to Portland and who has been bar bound at Tillamook during Sunday and Monday. We have sent a man down there for him and we expect he will be here to-morrow without question, and

we would like to have permission to call him when he reaches port. It has been impossible to get him here.

Mr. DENMAN.—Will he be here to-morrow morning, Mr. Campbell?

Mr. CAMPBELL.—I expect he will be here; it all depends on when that vessel gets out of the Tillamook Bar.

Mr. WOOD.—There is just one other possibility, though it is hardly a possibility; we may be able to get hold of another fisherman simply to testify about signals.

Mr. DENMAN.—The reason I asked is this: When their case is in, it is quite likely that after consultation with Senator Fulton,—we will go over the testimony—that we will not put in any case at all, the entire fault being made out, as we think, by their evidence; and if this matter were to go over until to-morrow morning, I think it is quite likely, we could avoid putting in any evidence. I should like to talk it over with the Senator and I should like to hear what this man Anderson is going to say. But with the record in the condition it is, we believe the entire fault to have been shown to have been that of the “Kern” and that we need bother the Court with no further evidence on our part. As I say, I want to consult with my colleague.

The COURT.—You will not know as to that then until this other witness is produced? [286]

Mr. DENMAN.—Until this other witness is produced, but if he is to be here in the morning, we will know at that time.

Mr. WOOD.—Well, if it will facilitate your consultation—not that we would expect you to be bound in any way,—the witness Anderson will simply be in a general way corroboratory of Moran as to the signals given and what was done on the “Kern,” and the fisherman if we get him, will be to the same effect as that young man that was on yesterday, that he heard the one whistle and the four given. That is all the testimony we expect. Corroboratory also of Arneson, that man who testified who was up on the fore-castle-head of the “Kern.”

Mr. DENMAN.—You can’t corroborate both, because one says the first whistle was blown when a thousand feet apart and the other says three-quarters of a mile.

Mr. WOOD.—I am not referring to those nice distinctions or differences. I am trying to tell you what their line of testimony will be in a general way.

Mr. DENMAN.—I think it might save the court considerable time if we are permitted to go over until to-morrow morning.

The COURT.—Very well, the court will take an adjournment until to-morrow morning.

(Thereupon court was adjourned until Wednesday morning, February 7, 1912, 10 o’clock A. M.) [287]

Portland, Oregon, February 7, 1912, 10 A. M.

Mr. CAMPBELL.—If the Court please, we found that the steamer did not arrive at Astoria in time for the man to reach here last night. He will come on this morning’s train—the noon train from Astoria.

COURT.—Then you rest, with the exception of that?

Mr. CAMPBELL.—With the exception of that, and if the fisherman should come on the noon train, we wish to put him on for a few words. We will rest, with the exception of these two witnesses, whom we expect to be here on the noon train. There is a possibility, but rather remote; that the fisherman will be here also.

Libelant rests.

Mr. DENMAN.—If the Court please our case will differ in what I think you will conclude are but minor details from the case made out by the pilot Moran on the “Kern.” We will show that we came around the point above, saw the “Kern” lying about eight hundred feet offshore, apparently moving downstream; that we elected to pass inside of her, on a course that would have brought us two or three hundred feet between her and the shore. We went about a thousand feet from her and signals were given by us, and she responded with a cross and different signal, which refused us permission to go through. The only maneuver we had left was a backing maneuver, and with the kind of propeller we had, that backing maneuver threw us over into her. Her whistle was a command [288] really for us to go in that direction. It was the only thing we could do. When we received this cross-whistle from her the only thing it indicated to us was that there was something lying in the way in that eight hundred feet of space. We had to assume that, because it was clear to our eyes, and we did assume, and will show from the witnesses, that the presumption was there was something in there we had to avoid. We con-

tinued on this turning course to port until we struck the other vessel in the position described. At the time we began the maneuver, about one thousand feet from the other vessel, we were well to her starboard, and heading on this course two or three hundred feet to the starboard of the "Kern" toward the Washington shore. That is the case we will show. [289]

Testimony of W. H. Patterson, for Claimant.

W. H. PATTERSON, a witness called on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. DENMAN:

Captain Patterson, what is your occupation?

A. I am a ship-pilot, sir.

Q. How long have you been a ship-pilot?

A. Twenty-five years.

Q. How long have you held a license as a pilot?

A. Well, I have held a license about twenty-seven or eight years.

Q. Where have you piloted during these twenty-five years? A. On the Columbia River.

Q. Do you know the steamer "George W. Elder"?

A. Yes, sir.

Q. How long have you known her?

A. Well, I have been pilot—have known the "George W. Elder" for—well, ever since she came out here.

Q. Over twenty years, isn't it? A. Yes, sir.

Q. How long have you piloted her?

(Testimony of W. H. Patterson.)

A. I have been pilot on the "Elder," off and on, for over twenty years.

Q. Familiar with her steering capacity?

A. Yes, sir.

Q. What is her maximum speed?

A. At maximum speed she makes between eleven and twelve knots.

Q. What would that be in miles? [290]

A. Well, that,—let's see, twelve knots would be about thirteen and a half miles.

Q. You think between eleven and twelve knots?

A. Yes.

Q. How does she mind her helm?

A. First class.

Q. Going at full speed?

A. Yes, sir, either way.

Q. Is she quick or slow? A. She is quick.

Q. What sort of a propeller has she?

A. It is what we call a left-hand wheel.

Q. What does that mean?

A. Well, a left-hand wheel and a right-hand wheel; a left-hand wheel backs to starboard and a right-hand wheel backs to port. Just reverse from one another.

Q. What do you mean by backing? Let me put this situation: Suppose going ahead in the water at full speed, and you reverse your propeller on the "Elder," full speed, what is the effect on the course of the "Elder"?

A. Well, she would back to starboard.

(Testimony of W. H. Patterson.)

Q. I am presuming now that she was going ahead in the water at a speed of twelve knots.

A. Yes, sir.

Q. She continues under momentum, doesn't she, when you reverse the propeller? A. Yes, sir.

Q. Now, which way will the bow turn when you reverse full speed?

A. May I use these models?

Q. Yes.

A. If we go downstream like this and are going along here, the bow would go that way.

Q. Which direction?

A. That is going to port and her stern will go to starboard that way. [291]

Q. When you say "backs to starboard" you mean the stern toward starboard?

A. And the bow to port.

Q. What course will she describe in the water under those conditions? A. How is that?

Q. She is going ahead under the momentum that is left in her from full speed, and you give full speed astern and reverse full speed; now, what course will your vessel describe as she goes through the water?

A. Well, she will keep surging ahead and swing her bow to port and stern to starboard.

Q. Curve in the water to the left? A. Yes, sir.

Q. Presuming, now, your course is downstream, you are sailing on the course, and at this point you are going full speed, the point being the point marked "X," and you then reverse your propeller full speed; show me in dotted lines what direction the "Elder" will go.

(Testimony of W. H. Patterson.)

A. This is the Washington shore and this is the Oregon shore; then she will put her stern over this way.

Q. I asked what direction would be her course through the water as you go on with your vessel; describe the course through the water.

A. Course through the water?

Q. As the vessel goes ahead from here, will she go that way? A. No, go this way.

Q. Will the course through the water curve or go straight? A. Curve off like this.

Q. As quick as this? [292]

A. Of course that is only a small scale.

Q. Now, presume that that point is a thousand feet ahead of you—the point marked “Y.” How will your vessel curve with reference to that point as you go on that course?

A. Well, she will keep overreaching all the time, but at the same time swinging this way all the time.

COURT.—Swinging to the Washington shore?

A. Swinging to the Oregon shore.

Q. Is that the direction you mean, like that?

A. Yes, like that.

Q. And your maneuver will finish, if you keep on going, at the point “Z” towards the—

A. Oregon shore.

Q. Oregon shore. Is that universally true of left-hand propellers?

A. Yes, sir, all left-hand propellers are the same.

Q. How long has the “Elder” been running up and down this stream? A. Over twenty-five years.

(Testimony of W. H. Patterson.)

Q. Always had this left-hand wheel?

A. Yes, sir, came out *for* the east built for this here special route.

Q. Always had this left-hand propeller?

A. Yes, sir.

Q. Always been known as a left-hand ship?

A. Yes, sir, always; couldn't make anything else out of her. Her engine is built that way.

Q. About what was the "Elder" drawing on that date?

A. About eighteen feet—eighteen—eighteen and a half—I forget which. It was about eighteen feet, I know.

Q. You haven't looked that up, have you, recently?
[293] A. No, sir, I didn't.

Q. Couldn't have been as much as sixteen, instead of eighteen?

A. Well, no, I am pretty sure it was that deep aft. Of course she doesn't draw that much forward.

Q. How was she laden forward?

A. How much?

Q. How deep was it forward?

A. Well, I ain't sure whether twelve or fourteen feet.

Q. There was quite a difference, though, between forward and aft?

A. Always is in them vessels.

Q. What is the reason for that?

A. Handle much better; steer much better. Of

(Testimony of W. H. Patterson.)

course if fully loaded you will of course get almost even keel.

Q. On this day there was a difference of four to six feet between the bow and stern?

A. Forty-six feet?

Q. Four to six feet.

A. Four to six feet; I think there was, yes.

Q. When you came around Cooper's Point on that night did you see this tug, the "Kern"?

A. I seen a vessel ahead, yes, sir.

Q. Which way did she appear to be going?

A. I couldn't tell. I supposed she was going downstream, after passing the other vessel going upstream.

Q. As you looked could you see any lights—side-lights? A. I couldn't see any lights at that time.

Mr. FULTON.—What is that?

A. I couldn't; no, sir.

Q. What did that indicate to you? [294]

A. That she was going downstream.

Q. What was your course as you came down after passing Cooper's Point with reference to the "Kern"?

A. My course was down the Washington shore.

Q. And how far—where was your course through the water with reference to the "Kern"?

A. Why, we aimed to keep off all the way from six to eight hundred feet there.

Q. Offshore, you mean? A. Offshore, yes.

Q. How far was your course you took that night when you saw the "Kern" lying in the water, inside

(Testimony of W. H. Patterson.)

the "Kern" or outside?

A. My course wouldn't take me probably over three or four hundred feet off the beach—off the Washington shore.

Q. Did you receive any signals from the "Kern" on that night? A. Yes, sir.

Q. How far were you from the "Kern" when you received the signal?

A. Well, I was between—when I got the signal from the—

Q. From the "Kern"? A. The "Kern"?

Q. What distance in the water?

A. Oh, I must have been fifteen hundred feet or more, anyway, from her. Yes, over that; about fifteen hundred; between twelve and fifteen hundred feet.

Q. I am now asking you when you received the first signal from the other vessel.

A. From the other vessel. Well, I was between twelve and fifteen hundred feet.

Q. Whereabouts was the other vessel then with reference to your bow? [295]

A. On my port bow.

Q. On your port bow? A. Yes, sir.

Q. By the way, as the vessel rounds Cooper's Point and turns straight upstream, where did she lie, on your port bow?

A. When we first come down by Eureka channel, through there, and come around Cooper's Point, I seen a vessel was ahead. I pulled my vessel around so I had her on my port bow about half a point.

(Testimony of W. H. Patterson.)

Q. And you continued that until you got the signal from her? A. Yes, sir.

Q. That was in response to a signal from you?

A. From me, yes.

Q. Now, what did you do then?

A. When I got this signal from the "Daniel Kern"?

Q. Yes.

A. I told the officer on the bridge to stop her; put his engines full speed astern.

Q. Was that done?

A. It was, sir, immediately.

Q. What was the effect of that maneuver on your vessel? How did it send her in the water?

A. Well, threw her stern to starboard and her bow to port.

Q. What course would it make her take through the water? A. On a swinging curve.

Q. In what direction?

A. Toward the Oregon shore.

Q. When you received this course signal from the "Kern" what did that indicate to you?

A. Well, it is either a cross-whistle or a danger-whistle. [296]

Q. What did it indicate to you?

A. Indicated to me I must stop my ship and put full speed astern to save a collision and save hitting something.

Q. What did it indicate to you with reference to the condition of the water ahead?

A. I didn't know; supposed some obstruction

(Testimony of W. H. Patterson.)

ahead. That is the reason he didn't want to let me by there; I might run into something.

Q. Did you strike the "Kern"? A. Yes, sir.

Q. Is that about a fair description of the angle which you struck? A. No, sir, I don't think it is.

Q. Well, how did you strike her?

A. We struck the "Kern" right in here. We never struck her that far ahead. According to this, you know, we would be half way up through the ship. We struck the "Kern" right in here, right in this way.

Q. At what angle?

A. Well, I should say about right angles.

COURT.—Better mark it on the model.

Mr. DENMAN.—We will bring it out later.

Q. Now, let me ask you about the handling of the "Elder," and this is entirely apart from this particular case. I want to put a theoretical case to you. Suppose, now, you are right behind the "Kern," pointing in exactly the same direction that she is pointing, straight behind her, straight astern, and you will strike her square amidships astern, if you go ahead, five hundred feet away, and you are going at full speed, [297] would you have any difficulty in clearing to starboard, presuming she is lying dead, now, in five hundred feet?

A. No, sir; wouldn't have any trouble at all.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Apostles on Appeals.
(IN TWO VOLUMES.)

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VOLUME II.
(Pages 321 to 647, Inclusive.)

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District of Oregon.

(Testimony of W. H. Patterson.)

Q. Is that a maneuver that you are required to make frequently in this river, here?

A. Required to make very frequently in this river, here; almost every trip, as you go up and down the river, you have that occurrence to do—the same thing to do.

Mr. CAMPBELL.—I want to inquire whether there are any of the witnesses of the “Elder” in court. I don’t know them myself.

A. There is none here, sir; none that belongs to the “Elder” at all.

Q. Suppose you were a thousand feet from her?

A. I could turn halfway around.

Q. In a thousand feet?

A. A thousand feet, yes.

Q. You say that when about twelve or fifteen hundred feet away from the “Kern” she gave you these signals. Was that following any signal of yours?

A. Yes, I blowed one whistle; got no answer.

Q. I am speaking when you were a thousand feet away, or twelve hundred feet away, was the signal you got from the “Kern” in response to any signal from you?

A. That is when I blew my second whistle.

Q. What was it? A. One whistle.

Q. What does it mean?

A. Means for me to pass starboard.

Q. To his starboard? [298]

A. Yes, that is my whistle.

Q. You were asking for permission to pass to his starboard? A. His starboard, yes.

(Testimony of W. H. Patterson.)

Q. That is when you got the cross-whistle?

A. Cross-whistle; yes.

Cross-examination.

Questions by Mr. CAMPBELL.

Now, when you rounded Cooper's Point and saw these lights ahead, you knew it was the "Kern," didn't you?

A. I knew it was a vessel going downstream, yes, sir.

Q. You knew it was the "Kern," didn't you?

A. Wasn't sure at that time whether it was the "Kern" or not.

Q. Why were you not sure?

A. Might have been some other vessel going down.

Q. Hadn't you passed the "Hercules"?

A. I had passed the "Hercules," yes.

Q. You knew what business the "Hercules" was in? A. Yes, sir.

Q. You saw the light barges, didn't you?

A. Saw them going up the river.

Q. Going up the river?

A. Saw the light barges with the "Hercules" in tow.

Q. Had she passed Cooper's Point? A. Yes, sir.

Q. Had the light barges in tow, going up the river?

A. Yes, sir.

Q. How far above Cooper's Point did you meet her?

A. This side Cooper's Point, probably a quarter of a mile.

Q. A quarter of a mile above? A. Yes, sir.

Q. Nearly to Eureka Cannery? [299]

(Testimony of W. H. Patterson.)

A. That is farther above.

Q. How far above?

A. Eureka Cannery a mile above Cooper's Point.

Q. At that time the "Hercules" was fast to the barges? A. Yes, sir; it was.

Q. When you passed the "Hercules" in tow of the light barges, if you did as you said, then you knew that the "Kern" was below, didn't you?

A. Knew the "Kern" was on the way down the river somewhere. Didn't know what position she was in at that time. Had no way of finding out.

Q. When you rounded Cooper's Point, you didn't know it was the "Kern"?

A. I wasn't sure whether it was the "Kern" or not. Might have been some other vessel. I could not tell until I found out. My mind is not as good as all that.

Q. You were submitted to quite a severe examination by the United States Inspectors, weren't you, on this collision? A. I was, yes, sir.

Q. They found you at fault for the collision, didn't they?

Mr. DENMAN.—I object to that question, if you intend to try that other case here. Here is the question: Presuming this man was found in fault before another tribunal, now, if that is to be evidence in this case we have to go into the other case; show the difference in the evidence given there and the evidence given here, and show that the facts on which they based their decision are entirely different from the facts upon which we ask the Court to pass. I submit the question should not be allowed to be put to the witness. [300]

(Testimony of W. H. Patterson.)

COURT.—What is the purpose of the question?

Mr. CAMPBELL.—I think it goes to the veracity of this witness.

Mr. FULTON.—If they claim he made any different statement there—

Mr. CAMPBELL.—This witness testified to a certain condition of facts.

COURT.—You may ask the question and we will see what becomes of it. I will overrule the objection and you may proceed.

Q. The question was whether or not you were not found at fault for this collision.

A. I was, in a way, yes, but if I had had a fair show and had had models of the barges and everything to show the Inspectors I would not have been in fault at all, and if I win this case I am coming back at the Inspectors and ask for a new trial.

COURT.—I think the findings of the Court is the best evidence upon that.

Mr. DENMAN.—We move to strike out the evidence in so far as it shows there has been an adverse decision.

Mr. WOOD.—It seems to me that is a *quasi* judicial finding.

COURT.—The mere fact that a decision of that kind is made by the Inspectors would not control this Court on a finding under the evidence which is adduced here. I understand from counsel that they simply produce that as a matter of showing the credibility, or as bearing upon the credibility of the witness.

(Testimony of W. H. Patterson.)

Mr. DENMAN.—Produce the judgment or the testimony.

COURT.—The judgment itself, the finding that he was in error? [301]

Mr. DENMAN.—As affecting his credibility.

COURT.—I understand that was what he offered it for.

Mr. DENMAN.—Then we object on the ground that it is irrelevant. There is no logical connection between that finding and the credibility of this witness. As far as that finding is concerned he may have gone in and confessed his fault.

COURT.—The rule is that a man may be asked on the witness-stand—and that goes to his credibility—as to whether or not he has been convicted of a crime, and my mind is running on that line, as to whether or not this would be a matter proper to be received in evidence, simply as going to his credibility. Is that all you offer it for, Mr. Campbell?

Mr. CAMPBELL.—That was my object in asking.

COURT.—I think on that ground I will let it in, for that purpose, and for that purpose alone.

Mr. CAMPBELL.—For instance, this entire matter was laid before the Inspectors, and there is absolute contradiction in the testimony between the parties.

Mr. DENMAN.—Now, Mr. Campbell, there is no evidence of that in this case.

Mr. CAMPBELL.—I am not offering this in evidence. I am explaining to the Court.

(Testimony of W. H. Patterson.)

Mr. DENMAN.—You can't argue to the Court on another case entirely.

COURT.—I will say that the finding will not affect this Court, because we are not trying that matter. The only ground upon which I will admit the evidence at all is as affecting the credibility of the witness. That is as far as it could go, as I say, under any circumstances. [302]

Mr. DENMAN.—Your Honor, I object on the further ground that no foundation has been laid showing that there was any controversy as to the credibility in the other case at all. There is not shown in this record any conflict of testimony between this party and anybody else. Furthermore, in the controversy a crime is not involved. There is no criminal element in it.

COURT.—The Court when it comes to a final consideration of the matter will give it such consideration as it is entitled to as the Court may be advised hereafter.

Mr. CAMPBELL.—The Court will understand I was not attempting to go into, in this case, the testimony in the other case, but I was trying to tell your Honor my reason, or my views as to why this question was admissible to affect the credibility of this witness. This man testified he was given a cross-signal or two whistles; the other man testified he was given a danger signal.

Mr. DENMAN.—That is entirely unfair.

Mr. CAMPBELL.—Isn't that true?

Mr. DENMAN.—My opponent is not entitled, by

(Testimony of W. H. Patterson.)

question or otherwise, to bring in through me or through anybody but the witness on the stand, what occurred in another case.

COURT.—I will not go into the other case. I think that is as far as I will permit the examination so far as the other record is concerned, as affecting the credibility of the witness.

Q. Now, you recall what you testified to before the Inspectors, don't you? A. I do, yes, sir.

Q. And you remember at that time—you have read it over since that time, haven't you? [303]

A. No, sir; I never have.

Q. Never have? A. No, sir; no, I haven't.

Q. Your memory on incidents leading up to the collision was probably fresher in your mind at the time you were here before the Inspectors than it is now, three years afterwards?

A. Well, I don't know as they would be. I remember all about it now. I remember now just about as well as I did then.

Q. Could you then as well as now?

A. Could I then as well as now?

Q. Could you remember as well then as you do now? A. I think so; as least I tried to.

Q. Then this testimony is correct, is it, Captain?

A. Sir?

Q. I want to read a little of this to you: "Q. Now, when you first saw the 'Kern' it was as you rounded Cooper's Point? A. Yes, sir. Q. And what did you see of her then? A. Seen the 'Kern.'

(Testimony of W. H. Patterson.)

I could see her lights and the barge lights and everything going. Q. All the lights, did you say? A. I seen her searchlight and all over. Her other lights around the barges making fast, whatever they were doing. Q. You saw the lights on the barges? A. Oh, yes, I could see the carrier lights on the outside of the barge, of one of the barges—carrier light on each side. Q. You knew it was the ‘Kern’? A. I knew it was the ‘Kern,’ yes, sir.”

Mr. DENMAN.—Read it all.

Mr. CAMPBELL.—You may read it when you come to redirect examination.

Mr. DENMAN.—You left out the next question.
[304]

Mr. CAMPBELL.—Q. Now, you want to testify that you thought when you rounded Cooper’s Point the “Kern” was on her way down the river?

A. Certainly I said the “Kern” was on her way down the river.

Q. And in this testimony you say that at the time you rounded Cooper’s Point you could see the barges were being made fast?

Mr. DENMAN.—Or whatever it was.

A. Or whatever it was, yes.

Q. Whatever they were doing, you saw them doing something at that particular place?

A. I knew something going on. I supposed were moving, making fast, going on down the river.

Q. When this question was asked, “You knew it was the ‘Kern’?” you correctly answered, “I knew it was the ‘Kern,’ yes, sir”?

(Testimony of W. H. Patterson.)

A. I might have said that.

Q. It was true, wasn't it?

A. I don't know whether it was or not.

Q. You were trying to tell the truth?

A. Why, certainly, as near as I know how.

Whereupon Court adjourned to 2 o'clock P. M.,
Wednesday, February 7, 1912. [305]

Portland, Oregon, Wednesday, February 7, 1912,
2 P. M.

W. H. PATTERSON resumes the stand.

Mr. DENMAN.—There was a question on direct examination I did not put to the witness, on which I am sure Mr. Campbell will want to cross-examine. I will put it to him now, with counsel's permission. (To witness.) Captain, I ask you whether you ordered this full speed astern maneuver?

A. Yes, sir.

Mr. DENMAN.—Was it executed?

A. Yes, sir.

Mr. DENMAN.—Was it followed up by any further order? A. Yes, sir.

Mr. DENMAN.—What was that?

A. I kept ringing continuously until we got almost down to the wreck,

Mr. DENMAN.—What was the purpose of it?

A. I wanted to notify my engineer there was something wrong; I wanted to back the ship as hard as we could.

(Testimony of W. H. Patterson.)

Mr. DENMAN.—That is the usual thing?

A. Yes, sir, on all ocean-going steamers.

Cross-examination Resumed.

Q. What was the necessity of that, Captain?

A. So as to let the engineer know we wanted just as much power out of the engines as we possibly could get to stop the ship.

Q. When you give an order from the bridge for full speed astern doesn't the engineer obey it?

A. Yes, sir. [306]

Q. When you order the engine full speed astern doesn't he put the engine full speed astern?

A. Yes, sir, he puts the engine full speed astern, but he doesn't throw the engines wide open to give her all there is in the engine. No ship does that.

Q. How do you know that?

A. That is the customary rule of sea-going ships.

Q. Do you know it on this particular vessel?

A. I know it on all vessels.

Q. When you give the direction full speed astern don't you go full speed astern?

A. Yes, sir, go full speed astern.

Q. When you say full speed astern don't you mean full efficiency which will run the vessel backwards?

A. Yes, but always an engineer can give a little more all the time. Can tell the fireman to raise to higher steam.

Q. Then between the time you gave the first signal and the second signal full speed astern he told the fireman to put on more steam?

(Testimony of W. H. Patterson.)

A. No, he don't run around to the fireman to tell him anything, the engineer don't.

Q. What did you say it for?

A. He has a man he sends there.

Q. Before we get further, let's understand. Let me finish my question and I will give you a chance to finish your answer. What did you mean, then, when you said it was necessary so that the fireman could get more steam on?

Mr. DENMAN.—He didn't say it was necessary, he said it was the practice to do it.

A. It isn't a practice, of course, not to do that.
[307]

Q. What did you mean when you said it was necessary so that the fireman could get more steam on her? A. In backing?

Q. Yes, after you gave the second signal full speed astern.

A. Oh, a speaking tube. All the engineer has to do is to tell the oiler to telephone the fireman to keep up as much steam as possible. That is an easy thing.

Q. Why was it necessary to give these repeated orders full speed astern, on several occasions?

A. So as to notify the engineer down below something was wrong. We wanted to get the ship stopped as quickly as possible.

Q. Why was that?

A. He wouldn't know. I might be going into the beach with the ship.

Q. Why was that necessary?

(Testimony of W. H. Patterson.)

A. Why was that necessary?

Q. Yes.

A. Why, to let the engineer know there was something wrong, I say.

Q. Why was it necessary for you to have her go full speed astern?

A. Because I seen these barges and this boat ahead here; seen an obstruction of some kind; I didn't know whether it was barges or what it was then.

Q. Didn't I read the testimony to you this morning, wherein you said you saw the barges after you first passed Cooper's Point?

A. After I first rounded Cooper's Point?

COURT.—Wait until counsel gets through with his question before you answer.

Q. You testified before the Inspectors that you saw the "Kern" [308] and knew it was the "Kern" when you first rounded Cooper's Point, didn't you?

A. I don't think I said that at all.

Q. Didn't I read that to you this morning?

A. You might have read it, but I—I have got to come around the point first before I see her. I couldn't see her on the other side of the point.

COURT.—Don't argue; just answer the question.

A. All right.

Q. You couldn't see her on the other side of the point? A. No, sir.

Q. You couldn't see her on the other side of the point. How far off Eureka cannery did you pass?

A. Well, about—not over two hundred feet.

(Testimony of W. H. Patterson.)

Q. Not over two hundred feet?

A. Not with a deep drafter.

Q. Did you ever go down there to the location of the wreck afterwards?

A. Seen the wreck a good many times.

Q. Did you ever go down and take bearings on her? A. Did going up with ships, yes.

Q. Did you ever go down and take cross-bearings on her? A. No, I never did.

Q. You wouldn't say from your own knowledge that Captain Crowe was wrong when he said he stood upon the mast of the wreck and looked past Cooper's Point and picked up the tenth window of the cannery, from outside the cannery, would you?

A. I wouldn't think he could do it, no.

Q. You wouldn't say that was not correct, would you? A. Yes, I would. [309]

A. *Yes, I would*, I wouldn't believe him.

Q. Have you any knowledge which advises you so that you can say that?

A. Because I know going—how is that?

Q. You have never taken a bearing so you can say Captain Crowe was absolutely wrong?

A. Not from that standpoint.

Q. Now, then, look at this chart, Captain. If you came down two hundred feet off Eureka cannery and the "Kern" was in the position that she is indicated upon this chart, couldn't you see her from Eureka cannery past Cooper's Point?

A. No, sir.

Q. You couldn't? A. No, sir.

(Testimony of W. H. Patterson.)

Q. I want you to come down here just a moment and make a drawing for me. I want you to take and draw upon this drawing a line from the outer edge of the packing companies dock through Cooper's Point. Is that the line?

A. From Eureka cannery, yes. (Drawing.)

Q. I want it through the point. You have it just outside the point, now. A. Oh, through the point.

Q. Just at the edge of the point.

A. How are you going to get over these rocks here?

Mr. DENMAN.—Just draw it as he wants it.

Q. I meant the edge of the point; just so it cuts the edge of the point.

A. The edge of Cooper's dock, do you mean?

Q. Yes. Across the point now. Now, will you mark the line you have drawn "A B"?

A. What for?

A. *What for?* [310]

Mr. DENMAN.—Just mark it.

Q. I am asking you to do this, Captain,

A. What do I want to mark it for? You mark it, you can draw as well as I can.

Q. Is the line "A B" the one you have drawn?

A. That is the one I have drawn, yes.

Q. Now, Captain, if you were navigating outside that line to Cooper's Point—and you were, weren't you? A. A little bit; yes.

Q. And the "Kern" was sunk upon that line—upon the projection of that line from Cooper's Point,

(Testimony of W. H. Patterson.)

you could see her as you passed Cooper's cannery, couldn't you?

A. Yes, but how do I know she was sunk on that line?

Q. I am not asking that. I ask if you passed Eureka cannery two hundred feet off and the "Kern" was sunk upon the line "A B" somewhere below Cooper's Point, then you could see the "Kern" when you passed Eureka cannery, couldn't you? A. No, sir, I couldn't do it.

Q. Why not?

A. Well, you can't see it, that is all there is to it. You couldn't see it to save your life. You nor Crowe, nor nobody else.

Q. Why not?

A. How are you going to do it? You got all these trees hanging here and these trees on this point. You can't see across there.

Q. Let me give you the question again. If you pass Eureka Point two hundred feet off it, then you would pass to the south of the line "A B," wouldn't you? [311]

A. A little bit, yes.

Q. Now, then, if you passed to the south of the line "AB" and the "Kern" was sunk upon the projection of the line "A B," somewhere below Cooper's Point, you could, when you were two hundred feet off of Eureka cannery, see the "Kern" where she was sunk? A. You couldn't; no, sir.

Q. Can you explain to me on this chart why you can't do it? A. You can't do it.

(Testimony of W. H. Patterson.)

Q. Can you explain?

A. Because the "Kern" was sunk in here. She wasn't sunk on this line at all. She was sunk inside here.

Q. I am asking if she was sunk on that line.

A. I don't think so, no, you couldn't do it, because you have the obstruction of these trees along there, You couldn't see there.

Q. Then this point which I mark with the letter "C" projects beyond Cooper's Point?

A. On the same line; you could see the same line. You could see a line right there, but these trees on this point there are thick; heavy growth.

Q. But if you were out in the stream, two hundred feet beyond the end of the cannery dock, then the trees on Cooper's Point, the trees on the point marked "C," wouldn't obstruct anything in or on the projection line "A B" below Cooper's Point?

A. You couldn't see the "Kern" down there at all; it is impossible to see it.

Q. You don't answer the question; you understand what I am asking you, don't you?

A. Even if she was on that line you couldn't see the "Kern" [312] down there—on that line as you say the "Kern" was there, you couldn't see her at all.

Q. Why not?

A. Because I say the trees out in the way wouldn't allow.

Q. If the line "A B" passes the edge of Cooper's Point, and the edge of the point "C," still you say you couldn't see the "Kern"? A. No, sir.

(Testimony of W. H. Patterson.)

Q. And you still say you couldn't see 200 feet off the Eureka Dock?

A. No, sir; you couldn't see the "Kern" on that line there.

Mr. CAMPBELL.—Chart is in evidence and the lines are drawn on Libellant's Exhibit 5.

Mr. DENMAN.—In order that I may understand, what is the materiality of the question whether or not he could see the "Kern" above Cooper's Point or at Cooper's Point?

Mr. DENMAN.—I am not on the stand; if you have any objection on the ground of materiality, you can argue them.

Mr. DENMAN.—I am entitled to a reason. The point I make is this: It seems utterly immaterial so long as they saw the "Kern" at Cooper's Point, three-quarters of a mile away, what happened up the stream before that. I can't see how it affects the case in any way.

Mr. CAMPBELL.—This witness just testified he couldn't see the "Kern" above Cooper's Point.

COURT.—It goes to the credibility of the witness.

Q. Now, Captain, the reason you backed full speed astern and repeated the order several times was for the purpose of getting as much backing power on your vessel as was possible out of her engines and boilers? A. That was true, yes, sir. [313]

Q. So that at that time you knew a collision was imminent, didn't you?

A. I could see an obstruction ahead, certainly.

Q. I say, you knew a collision was imminent?

(Testimony of W. H. Patterson.)

A. Certainly.

Q. You knew you were in danger of colliding with that vessel?

A. That is an obstruction, isn't it?

COURT.—Answer the question.

A. Yes, having got those danger signals; when I started to put my ship full speed astern, I knew there was danger ahead of some kind, certainly.

Q. So, when you got those signals from the "Kern" you interpreted them as danger signals—danger ahead.

A. Whatever the signals might have been.

Q. You interpreted them as danger signals, I say?

A. It doesn't make a particle of difference whether I had two or four, because I had blown my one whistle and I had to stop my ship and put my ship, the law says, full speed astern.

Q. Didn't you say when you received these signals from the "Kern" you knew there was a collision imminent?

A. I didn't say danger signals. You are trying to interpret it to me that they were danger signals. If they were danger signals or cross-whistles, I had to do the same thing under the same circumstances.

Q. You interpreted them as danger signals, didn't you?

A. No, you are trying to interpret that way.

Q. You so testified this morning.

Mr. FULTON.—No, he didn't.

Q. Captain, when you put your engine full speed astern upon receiving the signal from the "Kern,"

(Testimony of W. H. Patterson.)

why didn't you blow the danger signal? [314]

A. Why didn't I?

Q. Yes.

A. Because I didn't have an opportunity to do it. I was trying to find what was ahead of me. There must be some obstruction ahead of me.

Q. Why didn't you blow the danger signal?

A. Why should I? I didn't have a chance. I was trying to find out what was ahead of me.

Q. You didn't know what was ahead of you?

A. No, had no reason to suppose it was a danger signal at all. He had blowed a whistle before—a cross-whistle to me, or danger signal, whichever you might put it.

Q. Before this? A. Before that, yes.

Mr. DENMAN.—Before what?

A. Before I put my engine full speed astern.

Q. Oh, you had danger signals from him before that? A. Before what?

Q. Before you put your engine full speed astern?

A. Now, you are not going to get me wound up on this. I am going to have a fair question—know what I am talking about.

Q. Didn't I understand you to say that before you put your engine full speed astern you had the danger signals from him?

A. Before I put my engine full speed astern?

Q. Yes.

A. He blowed me some whistles, yes.

Q. Those were danger signals, were they?

(Testimony of W. H. Patterson.)

A. If you might term it that way, they were cross-whistles.

Q. They were danger signals? [315]

A. It meant I couldn't go on the starboard side—had no chance to go on the starboard side. There was some obstruction there. It wouldn't be safe—these whistles.

Q. You interpreted them as danger signals?

A. They meant I must stop the ship and put the ship full speed astern.

Q. Did you interpret them as danger signals?

A. There was no difference whether danger signals or cross-whistles. I had to put my ship full speed astern.

Mr. DENMAN.—What did you interpret them to be?

COURT.—What did you suppose them to be?

A. That I must stop my ship.

COURT.—Were they danger signals?

A. Would be in a way, yes, Judge, because they was cross-whistles.

Q. If a cross-whistle was given you and you received it, weren't you required to blow a danger signal yourself? A. A danger signal myself?

Q. Yes.

A. He kept blowing them. He blowed two and then two again, one right after another.

Q. One right after another? A. Yes.

Q. Did you answer any danger signal?

A. No. sir.

Q. Why not?

(Testimony of W. H. Patterson.)

A. I didn't have an opportunity. I was trying to find out what was the matter. I says to the second mate, "For God's sake, what were those fellows trying to do?"

Q. You didn't have an opportunity to blow?

A. I was busy trying to find out what this obstruction was ahead of me.

Q. How long did it take you to find out? [316]

A. I didn't have any time to fool any time away, I will tell you that.

Q. What is that?

A. Didn't have much time to fool away.

Q. When you say you didn't have much time to fool away, you mean you didn't have very much time between the time you received the danger signal and the collision. Is that what you mean?

A. That is what I mean, yes, certainly.

Q. Now, Captain, when you came around—shifted your course at Cooper's Point, I understand you to say that you blew—that you ordered your helm aport?

A. When I came around Cooper's Point?

Q. Yes.

A. Yes, I ported my wheel and put him half a point on my starboard bow.

Mr. DENMAN.—Put him?

A. Put the "Kern."

Q. Did you port your helm above Cooper's Point or below?

A. Right at Cooper's Point, when I started to go around.

(Testimony of W. H. Patterson.)

Q. When you squared up?

A. I couldn't square up until I got around.

Q. Was it after you squared up that you put your helm apart?

A. No, sir; going straight then—had her half a point on the port bow when I blew my whistle.

Q. What I mean is, when you reached Cooper's Point you came down through Eureka Channel on a range, did you not? A. No, sir.

Q. Where did you come, how?

A. Straight down the shore line.

Q. Don't you run down from a range up above Eureka Cannery— [317] on a sign or a board that is nailed up on Eureka Cannery itself?

A. No, there is no sign. There is a stake light on the cannery.

Q. Isn't there a stick there for the daytime?

A. No, I never seen any there. I know where the stake light is. The light hangs on the southwest corner of it.

Q. At night? A. There is a light there.

Q. There is a pole upon the southwest corner of the cannery building which carries what kind of a light?

A. White light.

Q. That is a range light? A. No, sir.

Q. What is it? A. A single stake light.

Q. When you come down Eureka Channel past the cannery you go on that white light, don't you?

A. Yes, certainly.

Q. I mean you are carrying that white light over your bow? A. Yes.

(Testimony of W. H. Patterson.)

Q. When you get abreast Eureka Cannery you pick up the range on Cooper's Point, don't you?

A. Inside Cooper's Point, the red light and the white light—not on Cooper's Point. The point projects a long ways outside this range.

Q. And you come down on that until you get abreast Cooper's Point, don't you?

A. On that range light?

Q. Yes. A. No, sir.

Q. How do you come down?

A. Keep that on the starboard side—that is, after coming down—

Q. When you come down on that range light from the cannery to Cooper's Point, don't you come down on it until you get abreast [318] Cooper's Point?

A. That is Cooper's Point—this is the light inside here and the red light is on this rock here.

Q. You are pointing to "W" as Cooper's Point?

A. No, there is the range light, red on the rock and white here. That takes us up past Bill Hume's on that range.

Q. We are not talking about going up the river.

A. Going up or down, no difference.

Q. After you pass Eureka Cannery, or when you get abreast of it, isn't your next line that you follow determined by the red and white light just inside Cooper's Point? A. No, sir.

Q. What do they have it there for?

A. As I told you, that red light and the white light is on that dredge channel above Eureka—between Bill Hume's and Eureka.

(Testimony of W. H. Patterson.)

Q. You just said it was on Cooper's Point.

A. No, sir; I said it was inside Cooper's Point.

Q. What is the light at Cooper's Point?

A. A light for going both ways; when you go past the Eureka Cannery you put Eureka Point on the starboard bow.

Q. Until you pass Cooper's Point?

A. Until you pass Cooper's Point.

Q. And you pick up the Waterford Light?

A. After you go by you pick up the Waterford Light.

Q. When you come down from Eureka Cannery carrying the light from Cooper's Point on your starboard bow, you hold that course until the Waterford Light comes into view? A. As you get past?

Q. I say, you hold that course from Eureka Cannery, you hold that course until you bring the Waterford Light into view, don't you? [319]

A. Sometimes we do, and sometimes we don't. As a rule, we do.

Q. Did you ever turn before you bring the Waterford Light into view?

A. No, we can't, we would go on the rocks there.

Q. When you do bring the Waterford Light into view, you change your course to get past the Waterford? A. Yes.

Q. So you make a change in your course at Cooper's Point, don't you? A. At Cooper's Point.

Q. Now, then, did you port your helm for the purpose of making the change at Cooper's Point, or did you port your helm after you made the change?

(Testimony of W. H. Patterson.)

A. After I got past the light and coming around down for Waterford Light, I ported my wheel to put the "Daniel Kern" on my port bow.

Q. Did you make that change at Cooper's Point for the purpose of rounding Cooper's Point or for the purpose of putting the "Kern" on your port bow?

A. I put my ship down through the ship's channel past the "Daniel Kern" or whatever boat was at that point. I didn't know whether it was the "Daniel Kern."

Q. You understand the question. Did you port your helm for the purpose of rounding Cooper's Point, or to put this steamer on your port bow?

A. Port bow—to put whatever object it was on my port bow.

Q. Then you ported your helm after you was by Cooper's Point?

A. After I was by Cooper's Point, certainly, just by the point. Just after you get by the light.

Q. After you turned at the point you ported your helm? A. Certainly.

Q. Then, as I understand it, you ported your helm enough so [320] it would take you down about 400 feet off the Washington shore?

A. About that vicinity, yes.

Q. Is that right? A. That is about right.

Q. So that at that time you were planning to pass the "Kern" about 600 feet inside of her, weren't you?

A. I had plenty of room to pass down between the shore and the "Kern."

(Testimony of W. H. Patterson.)

Q. I say, you were planning to pass the "Kern" about 600 feet inside?

A. I didn't plan—I didn't know what distance she was off until afterwards—after the investigation.

Q. What room were you going to give the "Kern"?

A. There was plenty of room. I had plenty of room inside. You don't have to give a vessel 600 feet to pass her.

Q. Couldn't you tell from Cooper's Point that the "Kern" was about a thousand feet offshore?

A. No, sir; I couldn't.

Q. When you ported your helm half a point you knew it was going to take you up 400 feet off the Washington shore, didn't you? A. Yes.

Q. And how far did you figure that was going to take you off the "Kern"?

A. I supposed probably a couple of hundred or three hundred feet, somewhere.

Q. Then the "Kern" was not in as far as you thought she was?

A. Not—no—why, she was in the fairway, yes. She was right in the range channel like, but I had plenty of room to pass, if he had let me pass, with safety.

Q. I didn't ask you that. I know you are anxious to state that.

Mr. DENMAN.—I object to that "I know you are anxious to state that." [321]

Q. Captain, when you planned to pass within 400 feet of the Washington shore and when you figured you were going to pass to the right-hand side of the

(Testimony of W. H. Patterson.)

“Kern” about two or three hundred feet, and it did afterwards turn out the “Kern” was further off shore than you figured— A. It might have been.

Q. Didn't it afterwards turn out that way?

A. It turned out that way, yes.

Q. If you had turned Cooper's Point, as you say that you did, and ported your helm so as to take you 400 feet off the Washington shore, then you would have passed the “Kern” about 600 feet to her starboard, wouldn't you?

A. According to the way the wreck laid afterward, yes, but they wouldn't let me do it.

Q. Now, then, when you reversed full speed astern, you say that you threw your bow to port?

A. Threw the bow to port, yes.

Q. How much would it throw your bow to port in 500 feet?

A. Well, that is a thing that I can't judge for.

Q. You have been pilot of these steamers for twenty years, haven't you? A. Yes.

Q. Didn't you testify this morning to the effect that while going full speed ahead under a hard over helm you could throw her halfway around in a thousand feet?

A. Yes, but going full speed ahead; on backing with the wheel one way or the other you can't do that. That is no way—no seafaring man or no sailor can do it.

Q. After 20 years' piloting of this steamer you mean to say you can't testify how far the “Elder's”

(Testimony of W. H. Patterson.)

bow would go to port when you are backing her full speed ahead? [322]

A. No, sir; me nor no other man—I mean the exact distance she would swing. Of course, we know she will swing and she will swing fast, but how fast we couldn't exactly tell.

Q. You couldn't tell. How far would she swing in a thousand feet, Captain?

A. Well, in a thousand feet she would swing a good long ways.

Q. Now, if you put your helm to starboard when you backed full speed astern, would it swing as much?

A. I don't think it would make very much difference.

Q. Why did you put your helm to starboard?

A. So it would throw my head off quick, before we threw the engines off for backing.

Q. Did you order this helm starboard before you put full speed astern? A. At the same time.

Q. And the helm would be hard astarboard as quick as full speed astern?

A. The wheel would go hard astarboard quicker than the engines.

Q. So she wouldn't feel any effect in the engines before she would feel the effect of the helm hard astarboard?

A. At the same time, she would be swinging all the time.

Mr. DENMAN.—One moment. One of our witnesses on a theoretical question is in the courtroom.

(Testimony of W. H. Patterson.)

Do you desire to have him excused?

Mr. WOOD.—Yes, I think so.

Mr. DENMAN.—He is excused.

Q. As a matter of fact, you put your helm hard to starboard when you ordered your engines full speed astern, didn't you? A. I did, sir.

Q. You did that for a purpose, didn't you? [323]

A. As I just said, I wanted to throw the ship off as much as I possibly could as quick as I possibly could.

Q. For the very purpose of keeping her bow from going as rapidly to port as it would if you didn't have her helm hard astarboard?

Mr. DENMAN.—I don't think that question is intelligible. You put her helm to starboard to throw her head to port, not to keep her from.

A. To keep the ship's head swinging to port. If I put the helm to starboard the bow will go to port, won't it?

Q. If you put your helm hard astarboard, which way does that throw your rudder?

A. Throws the bow this way.

Q. Which way the rudder?

A. Throws the rudder this way.

Q. To port, doesn't it? A. Yes.

Q. Suppose your vessel is proceeding down the river, going ahead, and you throw your helm hard astarboard, which way will it throw your bow?

A. To port.

Q. Suppose you are backing and throw your helm

(Testimony of W. H. Patterson.)

hard to starboard, which way will it tend to throw your bow?

Mr. DENMAN.—You mean going backward, or backing your engine? You may be backing your engines while going ahead or may be backing the ship. You don't indicate by the question which you meant.

Q. I am talking about backing the engine under those conditions. If, when your vessel is going ahead, you suddenly reverse your engine full speed astern and throw your helm hard to starboard, does that tend to throw your bow more to port or to steady?

A. Does at the start.

Q. Does what? [324] A. Throws the bow off.

Q. Why?

A. Because the ship has a strong headway on her.

Q. So, then—

A. The ship is going through the water.

Q. As I understand, you were going a course you figured would take you from two to three hundred feet off the "Kern"? A. Yes.

Q. And at that time you figured also it would take you about 400 feet off the Washington shore?

A. I couldn't figure the distance at all. I figured she was going to clear. That was all I was figuring.

Q. Didn't you testify this morning 400 feet was the distance?

A. Well, I said it was, yes, when we came along down shore there.

Q. You were giving your best judgment then, weren't you? A. Certainly.

Q. Now, then, if when you reversed your steamer

(Testimony of W. H. Patterson.)

full speed astern you put the helm hard to starboard, it tended to throw her more toward the shore; if, when you backed full speed astern you threw your helm hard to starboard, as you have testified, it tended to throw the bow of your steamer all the quicker to port towards the "Kern," didn't it?

A. It did, yes. I was trying to stop my ship; that is what I was trying to do.

Q. You answer my question, please. I say it tended to throw your bow off quicker toward the "Kern," didn't it?

A. It had a tendency to throw my ship to port.

Q. Was that toward the "Kern"?

A. Toward the "Kern," yes, toward that way.

Q. Was it toward the "Kern"? [325]

A. Well, it naturally turned out that way, yes.

Q. Well, you saw at the time it was going to throw you toward the "Kern," didn't you?

A. What else could I do?

Q. I say, you saw at that time it tended to throw it toward the "Kern," didn't you?

A. Yes, threw me away from the "Kern," yes.

Q. Why did it throw you away from the "Kern"?

A. By backing my ship full speed astern and a left-hand wheel, it would naturally throw me away from her as much as possible.

Q. Then you were already carrying the "Kern" on your port bow?

A. I was carrying her on the port bow. My idea then was to throw my ship clear of the "Kern" if I possibly could. That was my idea.

(Testimony of W. H. Patterson.)

Q. But again I ask, didn't it have the effect of throwing the bow of your steamer quicker toward the "Kern"?

A. Certainly, toward the "Kern," yes.

Q. What did you mean this morning when you testified you knew she would swing to port when you saw the "Kern" 200 feet in a thousand feet?

A. What?

Q. What did you mean this morning when you testified, when you put her full speed astern 1,000 feet from the "Kern," or 1,500 feet, you thought it would throw you 200 feet toward the "Kern"?

A. I didn't say that.

Q. What did you say?

A. I didn't say that. I don't remember saying anything about that.

Mr. DENMAN.—Talking about going ahead, not reversing.

Q. Now, Captain, did you testify this morning that in running full speed ahead, if you suddenly starboard your helm, that it would throw your bow 200 feet to port in a thousand feet? [326]

A. Going ahead?

Q. Yes.

A. Oh, I thought you meant—I understand your question now.

Mr. DENMAN.—Just repeat the question so he will get it clear.

Q. (Read.)

A. Well, I misunderstood. I beg your pardon. I misunderstood your question there.

(Testimony of W. H. Patterson.)

Q. I didn't ask this question before. I ask this now. That is what you testified this morning, isn't it, that if you were running ahead and you suddenly starboarded your helm it would throw your bow up 200 feet to port in the thousand feet you travel?

A. I don't think I testified that, as I know.

Q. What did you say in respect to that?

A. I don't know now.

Q. If you did testify to that, Captain,—

A. If I was going along ten knots, you say, twelve knots?

Q. Full speed.

A. Full speed and I go a thousand feet away.

Q. Yes, and you suddenly starboard your helm.

A. I put my helm hard to starboard, I would clear an object much more than 200 feet, more than 400 feet, if I would keep my engines going, but my engines mustn't be stopped; they must go ahead so I get action on the wheel—on the rudder.

Q. Well, let's be clear about this. If you are running ahead full speed and you suddenly put your helm hard to starboard, you would clear by over 400 feet an object that was a thousand feet ahead of you. Is that correct?

A. I could, yes. I could clear three or four hundred feet. [327]

COURT.—Which side?

A. If I put the helm hard astarboard, that would put the object on the starboard side.

COURT.—That would throw your ship on the Oregon shore?

(Testimony of W. H. Patterson.)

A. On the Oregon shore—throw her off this way.

Q. Now, then, Captain, if you had put your helm hard to starboard at the time you came down behind the “Daniel Kern,” at the time when you were a hundred feet away and continued your engine full speed, you would have cleared her about 400 feet?

A. I have no right to do it.

Q. You would have cleared?

A. I would have cleared, yes, probably a little more.

Q. That would mean if you were running full speed ahead and you suddenly starboarded your helm, it would throw your bow about 400 feet to port while your ship was traveling a distance of 1,000 feet ahead, wouldn't it? That is what that means, doesn't it?

A. It would throw the bow of the “Elder” so.

Q. Let me repeat again. If you are running full speed ahead and you suddenly put your helm hard to starboard, it would throw your bow 400 feet to port while your vessel was going ahead 1,000 feet, wouldn't it?

A. Well, I said three or four hundred feet.

Q. Three or four hundred feet, yes. Now, then, Captain, if while you were running full speed ahead you backed your engine and put your helm hard to starboard, would your bow swing as much as it would if you were going ahead at full speed?

A. No, she wouldn't.

Q. How much do you think it would swing?

(Testimony of W. H. Patterson.)

Mr. DENMAN.—Do you mean the same time or the same distance?

Mr. CAMPBELL.—Same distance, a thousand feet. [328]

Mr. DENMAN.—You didn't put it in the question the same distance. The point is this, she would be going slower in backing.

Mr. CAMPBELL.—I will put it so we will have it clear in the record.

Q. If your vessel was going—was backed full speed astern after she had been running full speed ahead—if, while your steamer was running full speed ahead you suddenly back her full speed astern and throw your helm at the same instant hard to starboard, I ask whether or not her head—her bow would go as far to port as it would if you had continued running on full speed and put your helm hard to starboard— A. Might and might not.

Q. —in your judgment.

A. Well, I don't know.

Q. Will she swing as much under a hard over helm, hard to starboard helm when backing full speed astern as she will when going ahead full speed astern? A. No.

Q. So she wouldn't swing 300 feet if backing full speed astern?

Mr. DENMAN.—Same time or same distance?

Q. I mean distance. She wouldn't swing the same distance if backing as if going ahead.

A. I said I don't know—I don't think she would.

Q. How much less do you think she would swing?

(Testimony of W. H. Patterson.)

A. I couldn't tell.

Q. When you backed your steamer full speed ahead at this time and threw her helm hard to starboard you didn't know how far the bow would swing?

A. I knew it would swing, but I didn't know how far. No man could tell that. [329]

Q. You have been 20 years piloting that vessel?

A. Yes, 25 years.

Q. But you don't think, according to your best judgment, it would swing 300 feet?

A. Well, I don't know whether it would or not.

Q. Do you think it would swing more than 300 feet? A. Well, she might and she might not.

Q. Now, Captain, when you rounded Cooper's Point and ported your helm half a point so it would take you 400 feet off the Washington shore, if the "Kern" was a thousand feet off the Washington shore, it should have shut out your starboard light from the "Kern," shouldn't it?

A. It might have been shut out for all I know.

Q. I say, it should have shut it out?

A. Well, it looks that way, yes.

Mr. DENMAN.—That is what your witness testified.

Mr. CAMPBELL.—My witness didn't testify the light was shut off.

Mr. DENMAN.—I beg your pardon.

Q. Is that right, Captain? If the "Kern" was a thousand feet offshore and when you rounded Cooper's Point you ported your helm so as to carry you 400 feet off the Washington shore, wouldn't

(Testimony of W. H. Patterson.)

your turning your ship that much toward the Washington shore necessarily shut out your starboard light from the "Kern"?

A. It would depend on the screen board. It might and it might not.

Q. Are the lights on the "Elder" so fixed that you can see the green light across the bow of that ship?

A. No, no.

Q. Are they? A. No, I don't think so; no.
[330]

Q. Now, if they are fixed so that the green light does not shine across the bow, they are complying with the law, are they not? A. Yes—

Q. But if they did shine across they did not comply—

A. —but remember when I rounded Cooper's Point this vessel was a quarter of a mile away. It makes quite a difference.

Q. I say, if the screens on the green light were not fixed so that they could be seen across the bow of that steamer, then they were proper screens, were they?

A. I say they might and they might not.

Q. I say they were not proper screens, if you could see the light across the bow from the starboard side?

A. I didn't say they could.

Q. I say, they were not proper screens if you could see the green lights across the bow?

A. No, no, you are right about that.

Q. Now, then, if, after rounding Cooper's Point you ported your helm so as to bring you 400 feet off the Washington shore and the "Kern" at that time

(Testimony of W. H. Patterson.)

was 900 feet off the Washington shore, you ought to have shut out your green light from the "Kern," ought you not?

A. Well, I ought to, but I don't know whether we did or not. I wasn't on the "Kern," but was on the "Elder."

Q. You should have, if the screens were proper?

A. Yes.

Q. And, as far as you know, the screens were proper? A. As far as I know, yes.

Mr. DENMAN.—Mr Campbell, I will produce that at the time of the argument or at the close of our case. I remember very distinctly your witness testifying we shut out our green light. (Referring to colloquy on page 273.) [331]

Mr. CAMPBELL.—One of my witnesses yesterday?

Mr. FULTON.—Yes.

Mr. CAMPBELL.—When he rounded Cooper's Point?

Mr. DENMAN.—Just after that.

Mr. CAMPBELL.—I would just like to see that.

Mr. DENMAN.—Well, we will find it.

COURT.—Did you port your helm before you gave the signal to the other ship to pass?

A. Yes, sir; I ported my helm and brought her down to half a point with the "Daniel Kern" on the port bow when I first rounded the point—when I got right around the point.

COURT.—How soon after you ported your helm did you give the signal, the passing signal?

(Testimony of W. H. Patterson.)

A. The passing signal going down, why, just as soon as I rounded the point I ported my wheel. I seen an object and ported my wheel and brought around and blowed one whistle. Right after I put the wheel to port I told the officer on the bridge to blow one whistle, which he did immediately.

COURT.—Had the ship changed its course when you blew one whistle?

A. Yes, sir; going around the point and got her on my port bow when I done it.

Q. Didn't you testify before the Inspectors that you ported your helm after you blew your first whistle? A. I don't think so.

Mr. DENMAN.—In order to get it clear in Your Honor's mind, the whistles that were exchanged at the time they began to back were some time after this first whistle was blown off the point.

Mr. CAMPBELL.—That is what they testify.

COURT.—I understand that, but the witness Captain Moran [332] testified that they saw all the lights on the first signal that was given.

Q. Now, if you say you blew your first whistle immediately after rounding Cooper's Point, did you receive his response to it?

A. No response whatever.

Q. Why didn't you blow the danger whistle?

A. I blew another whistle.

Q. How soon afterwards?

A. Why, a few minutes, almost immediately after; when I found he didn't answer, I blew one more whistle.

(Testimony of W. H. Patterson.)

Q. How soon after you blew the first whistle did you follow with the second whistle?

A. Well, I can't say just exactly, a second or a minute or nothing of that kind.

Q. Didn't you have time to blow the danger signal after you blew your first whistle?

A. Why should I blow a danger signal?

Q. I say, didn't you have time to blow a danger signal between the time you blew your first whistle and your second whistle?

A. It wasn't necessary, sir.

Q. Is that the question?

COURT.—Answer the question. Did you have time between your first and second whistle to blow a danger signal?

A. Yes, I might if I had wanted to, yes.

Q. Doesn't the law require you, when you give a vessel a passing signal and that whistle is not answered, doesn't it require you to blow a danger signal?

A. I don't think so. I have a right to blow another whistle which is a common occurrence on the Columbia River. [333]

Q. So you don't think the law requires you to blow a danger signal after you give one passing signal and that is not answered?

A. Well, it has never been done.

Q. I am asking your idea about the law now.

Mr. DENMAN.—I submit the law will speak for itself.

(Testimony of W. H. Patterson.)

COURT.—You can answer as to your understanding of the rule.

Mr. DENMAN.—Do you contend there is a rule to that effect?

A. I seen I had plenty of room on the inside and I told the officer on the bridge to blow another whistle, for I seen I had plenty of fairway to go about my business clear.

Q. You say you blew your second one-blast whistle almost immediately after you blew your first one blast? A. Yes.

Q. Was that within a minute or a few seconds?

A. I didn't have my watch in my hand.

Q. Well, your judgment about it?

A. Well, I couldn't say; I won't say, because I don't know, but shortly afterwards.

Q. Well, after you blew your second whistle, why didn't you give the danger signal when you didn't receive any response?

A. Because they began to blow from the "Daniel Kern"—began to blow those two whistles.

Q. How many whistles did you get from the "Daniel Kern"?

A. I got two whistles, so far as I know—first two whistles, then two whistles again.

Q. Then how many?

A. God knows how many more; they kept on blowing.

Q. You didn't blame them, did you?

A. I don't know; if I had been in the same predicament I might have done it. [334]

(Testimony of W. H. Patterson.)

Q. Let me understand you. After you blew the second one whistle you got an immediate response from the "Kern" of two whistles?

A. After I blowed the second whistle?

Q. Yes.

A. Yes, I got two whistles, and then two whistles after that—almost immediately after he blew the first two.

Q. Then you had this: You had a one-whistle blast from our vessel, followed by a second; immediately after you got two whistles from the "Kern" and immediately after those two whistles, two whistles more?

A. That was my understanding. It was two whistles, as near as I could understand it.

Q. I say, that is the whistles you got?

A. That is what I understood, yes.

Q. Did you get those whistles?

A. I told you—

COURT.—He says that was his understanding. I think that is an answer.

Mr. CAMPBELL.—I thought it was the interpretation he was giving as to whether a danger signal or a passing signal.

Q. Now, Captain, how do you reconcile your statement this morning that you struck the "Daniel Kern" at right angles with the photograph which shows that you struck her angling into her stern? How do you reconcile it with that photograph?

Mr. DENMAN.—I object to that on the ground that it has been testified regarding this photograph

(Testimony of W. H. Patterson.)

that the stern had been pulled around afterward and cut off afterwards by the maneuver after she was struck. The testimony regarding this photograph was they cut in and afterwards screwed the stern off, so this photograph can't indicate the position at the moment of striking. [335]

COURT.—That shows the stern of the boat afterwards.

Mr. CAMPBELL.—It shows the cut. I am not asking about swinging.

Mr. DENMAN.—The testimony was the vessel cut in and then tore that off and they had to hold it together by chains when they brought it up.

Mr. CAMPBELL.—The testimony didn't say the stern was torn off. The stern was shifted around so it was lashed together with chains. If you will inspect the photograph you will see how the stern twisted. The photograph shows the cut.

Mr. DENMAN.—It shows how she was mashed, but whether it shows at the moment of the collision or afterwards—

COURT.—Captain Crowe illustrated with this model. Go ahead.

Q. How do you reconcile that statement, Captain, that cut shows the starboard quarter of this vessel?

A. That is where we hit her. Naturally, it bulged this thing all up.

Q. You still want to say you struck her at right angles?

A. I didn't say at right angles, entirely. I said we struck her a glancing blow when her bow was swing-

(Testimony of W. H. Patterson.)

ing to the—when our bow was swinging around like this. We hit her right in here on the starboard quarter. I said not as far ahead as Captain Crowe got this marked, but he said yesterday this was not exactly right.

Q. So the line of the blow of your steamer into the “Daniel Kern” was not, as you testified this morning, at right angles, but was an angling blow?

A. Was an angling blow, yes. I said straighter in than what this was.

COURT.—Further back?

A. Further back, right in here. [336]

COURT.—That is what I understood the testimony was.

Q. So it was not at right angles. Did you examine the “Kern” after it was raised?

A. I seen her in the drydock.

Q. After repairs were being made upon her?

A. After they started to pull her to pieces.

Q. Now, Captain, what does that law provide that you shall do when you reverse your engine full speed astern? A. In what case?

Q. In case when you are running ahead and you suddenly reverse your engine full speed astern, what does the law provide that you shall do?

A. Nothing, that I know of.

Q. Don't you know what the law requires you to do as the pilot of a vessel, when you are running down the river full speed ahead and you suddenly reverse your engine, with a vessel ahead?

A. If the vessel is astern, blow three whistles.

(Testimony of W. H. Patterson.)

Q. If ahead? A. Blow three whistles.

Q. Why not in this case?

A. I didn't have an opportunity to do it.

Q. Why not?

A. Was trying to find what this object was ahead of me.

Q. Would that make any difference what the object was ahead of you, as to whether you blew three whistles or not? A. Depends on circumstances.

Q. You knew there was a steamer ahead of you?

A. Certainly, yes.

Q. Don't the law require you to blow three whistles when you went full speed astern?

A. Probably, yes, but that wouldn't help the case any. [337]

Q. Doesn't it require it? A. I believe so.

Q. Why didn't you?

A. I said I didn't have time to do it. I was trying to find out what this obstruction was ahead of me.

Q. What difference what character of object was ahead so long as you knew it was a steamboat?

Mr. DENMAN.—He didn't say he knew it was a steamer.

A. I said I was trying to find out what the object was.

Q. Didn't you know it was a steamer?

A. Might have been something else there besides a steamer.

Mr. WOOD.—Excuse me; when his testimony was read over he said he knew it was the "Kern."

Mr. DENMAN.—The point is this: He saw the

(Testimony of W. H. Patterson.)

“Kern,” but the “Kern” signaled something was in the way to his starboard to prevent his going through. He was looking to see what that is.

A. It might have been one of those barges, floating around without lights. I couldn’t tell.

Q. What did the signals of the “Kern” mean as a matter of interpretation of the law? No word of mouth passed between you and the “Kern” to the effect that there was an obstruction at your starboard, did there? All you had was this series of four whistles—two whistles and two whistles? A. Yes.

Q. I again ask you why you didn’t blow these three whistles indicating your engines were working full speed astern when you reversed your propeller?

A. As I told you, I was trying to find out what the obstruction was ahead. My blowing three whistles wouldn’t help me a particle.

Q. What difference did it make the character of the obstruction ahead, with your blowing three whistles? [338]

A. I don’t know if it would have made any. I had plenty of room to pass inside. Why did he blow the danger signal—you say he blowed the danger signal? Why did he blow the danger signal? I had plenty of room to pass down there with safety—it is just the same thing.

Q. Captain, why did you shift your helm hard to starboard when you reversed your engine?

A. I just said so as to throw her off as much as I possibly could from his vessel ahead.

(Testimony of W. H. Patterson.)

Q. Did you expect to pass her to port—pass her on her port side?

A. I expected to pass her on my starboard side.

Q. And on her port side?

A. And on her port side.

Q. What difference did it make to you what obstruction there was then on the “Kern’s” starboard side?

A. What difference did it make to me?

Q. Yes.

A. You didn’t suppose I wanted to run into her, did you?

Q. Didn’t you just say you starboarded your helm when you reversed full speed astern for the purpose of passing the “Kern” on your starboard side? Isn’t that what you just said?

A. I said when I put my engines full speed astern I put my wheel hard to starboard at the same time. I seen this object ahead, and knowing the “Elder” was a left-hand wheel she would take this way and throw her bow away from the object ahead as quick as possible.

Q. You did say so as to assist her to throw her bow more rapidly to port?

A. Certainly, I wanted to get clear of the obstruction.

Q. And whatever it was you wanted it on your starboard bow? [339]

A. I wanted to get clear of it.

Q. You wanted it on the starboard bow?

A. Not any bow. I wanted to get clear, was my idea.

(Testimony of W. H. Patterson.)

Q. Was your idea to stop before you reached it or to pass to starboard?

A. Suppose would leave it on the starboard side.

Q. Then you thought you were going to leave it on the starboard bow?

A. I supposed I would leave it on our starboard bow then.

Q. Then what interest did you have in what might be on the starboard side of the "Kern" to prevent your blowing three whistles?

Mr. DENMAN.—You mean directly to starboard side or off?

A. You don't suppose I was going down in there, do you?

Q. Did you expect to pass the "Kern" on her starboard side?

A. After he blowed those whistles, I didn't expect to pass the other side. I expected to back up and get clear.

Q. Why did you starboard your helm then?

A. I told you once.

Q. You didn't expect to pass the other side?

A. I expected to clear him if I possibly could.

Q. You didn't expect to pass the other side?

A. I had to pass the same side—I had to clear him. I thought my ship would probably back fast enough to back clear of the particular object.

Q. You knew what the object ahead was, didn't you? A. I did at that time, yes.

Mr. DENMAN.—What object do you mean—the

(Testimony of W. H. Patterson.)

boat he could see, or the object they were signalling was obstructing the right-hand passage? That is the confusion all along. The witness has been speaking of the boat as the object and some [340] obstruction to passage as the object.

COURT.—He has said he knew it was the “Kern.”

Mr. DENMAN.—That is what I thought. He has made two statements about objects. He has said when he received the signals it indicated there must have been some object to obstruct his passage. Then he testified he must get away from the “Kern” before the collision came—one unseen object the whistle referred to, and one, the “Kern,” he could see plainly, and there is where the confusion is.

Mr. CAMPBELL.—If the Court please, Mr. Denman’s argument is very ingenious, but there isn’t a word in this record as to an obstructing object on the starboard of the “Kern.” Our men have testified they blew the danger signal because of an obstruction there, and I think counsel is unintentionally misleading the Court.

COURT.—No one has said there was an object there, but this witness, as I understand it, says when these signals were given he supposed there was an object to the starboard of the “Kern.” That is about the effect of it.

Q. Well, Captain, the real reason that you starboarded your helm when you backed your engine was a hope on your part that you might be able to swing the bow of the “Elder” far enough to port so she would clear the “Kern,” wasn’t it?

(Testimony of W. H. Patterson.)

A. That was the object, yes.

Q. And you didn't succeed in doing so?

A. We didn't do it, no. We hit her.

COURT.—Did you have any hope of stopping your vessel so she wouldn't reach the "Kern"?

A. I did, sir, yes.

Q. Did you expect to be able to stop the "Elder" before she struck the "Kern"? [341]

A. I was hoping she would.

Q. Did you expect to do so?

A. I thought probably she would, yes, by her being left-hand wheel and swinging that way I could probably do it.

Q. Did you expect to stop before reaching the "Kern"? Or expect to swing clear?

A. Expected both, to swing clear or to stop, if I could.

Q. So you did expect to stop her before she reached the "Kern"? A. Yes.

Mr. DENMAN.—If she swung clear and stopped she wouldn't reach it.

Q. Now, what distance can you stop the "Elder"—bring the "Elder" to a stop?

A. Well, it depends entirely on circumstances.

Q. What circumstances?

A. Depends on the conditions of how the ship is loaded, the draft of the ship, the current and the wind.

Q. Was there any current that night?

A. Well, there is supposed to be slack water there.

Q. Was there any wind that night?

(Testimony of W. H. Patterson.)

A. A little upstream wind.

Q. Was a little wind? A. Yes.

Q. Which way was it blowing?

A. Blowing upstream.

Q. With slack water and with what little wind there was there within what distance could you stop your steamer?

A. Well, that is a thing I never tried with the "Elder."

Q. You haven't?

A. Not going full speed ahead, and then stop and back her full speed?

Q. Yes. [342]

A. No, sir, never did; never had to.

Q. Give us your judgment about it.

A. Well, I couldn't say; she will go a long ways.

Q. Can't you give us your judgment at this time?

A. I don't think so, exactly.

Q. I will see if I can refresh your mind. How many minutes would it take to stop her?

A. I don't know.

Q. What is your judgment about it, Captain?

A. Well, I really couldn't say.

Q. Haven't you any judgment at all?

A. No, I haven't in regard to that at all. I never put her full speed astern. We always slow the ship down a long time before we stop her.

Q. What did you mean when you testified in response to Inspector Edwards' question as follows: "How long does it take the 'Elder,' backing full speed astern, to check her headway? A. Well, I should

(Testimony of W. H. Patterson.)

judge in the neighborhood of probably three minutes. You see we was making—well, yes, in the neighborhood of three minutes. Q. Could her headway be stopped and her going astern within three-quarters of a mile? A. No, sir. Q. It couldn't? A. No, sir. Q. You couldn't reverse and back her full speed astern and check her headway in three-quarters of a mile? A. No, sir." You remember giving that testimony, don't you?

A. It must be so, probably, if that is right there, but you must remember we didn't put her full speed astern until after he came back with his signal—after the second whistle. We went in that three-quarters of a mile a long ways—when we blew the first whistle we slowed her down and kept going, and [343] when the second whistle came back we were still going, and when he blowed the whistles that put me full speed astern I was pretty close to him at that time.

Q. At the time you testified before the Inspectors you thought it was right? A. What?

Q. That was your best judgment at that time?

A. I don't see nothing there to make any difference.

Q. So that is your judgment now—you couldn't stop her within three-quarters of a mile?

Mr. DENMAN.—He said he has never tried it.

A. I have never tried it.

Mr. CAMPBELL.—I object to this.

Mr. DENMAN.—I beg your pardon.

A. Judge, I never tried it. That is all there is to

(Testimony of W. H. Patterson.)

it. I slowed the engines when I blowed the first whistle. Between that and the second whistle my engine was going slow and the ship was going through the water at a rapid start. Then they blew their whistle and as the whistle came back that is the time I told the man to stop the engine and put her full speed astern, but at the same time I was over-reaching all the time, going down the river.

Q. Let me understand you. According to this testimony you gave before the inspectors, you couldn't stop your vessel within three-quarters of a mile.

Mr. DENMAN.—Do you mean, now, with reference to the time he stopped his engine after he had slowed the engine beforehand or when it was going full speed?

Mr. CAMPBELL.—I object to this continual interruption. If the Court please, I don't think I am entitled to be quizzed [344] in accordance with Mr. Denman's habit.

Mr. DENMAN.—I object to the question on the ground that it is ambiguous. It doesn't show which situation he is referring to. There have two situations been testified to. One is what the vessel would do going full speed ahead and then the reverse signal is given, how soon it would stop. The other situation is, she had been going along at a slowed speed, then the order full speed astern was given. I don't know which he refers to. I don't want the witness confused because we must be particular in this. It is purely theoretical. Now, which situation does counsel refer to?

(Testimony of W. H. Patterson.)

Mr. CAMPBELL.—Again I say I am not called upon to be quizzed by counsel.

COURT.—Ask the question again.

Q. Captain, if your steamer is running full speed ahead—exactly what I asked before—if your steamer is running full speed ahead, can you stop her within three-quarters of a mile?

A. Well, as I said a minute ago, it depends entirely upon circumstances—depends upon—

Q. Under the conditions that prevailed there that night, we will say?

A. Well, I ain't able to say. I might have said that there, but I don't know as I could tell exactly. As I said to Edwards at that time, I couldn't tell.

Q. Did you say you could or no, sir, you couldn't do it? When you told Captain Edwards you couldn't. He said, "How long does it take the 'Elder' backing full steam astern to check her headway? A. Well, I should judge in the neighborhood of probably three minutes. You see, we was making—well, yes, in the neighborhood of three minutes." When you made that answer you had in mind the conditions prevailing that night? [345]

A. I might have said that.

Q. (Continues reading:) "Couldn't her headway be stopped and her going astern within three-quarters of a mile? A. No, sir. Q. It couldn't? A. No, sir. Q. You couldn't reverse and back her full speed astern and check her headway in three-quarters of a mile? A. No, sir." Now, you didn't misunderstand Captain Edwards' question, did you?

(Testimony of W. H. Patterson.)

A. I don't suppose I did.

Q. Now, then, you knew then that when you backed your engine full speed astern within a distance of 1,000 to 1,500 feet of the "Kern" it was absolutely hopeless to stop before you reached the "Kern"?

A. No, I didn't. I thought it would swing her far enough so she wouldn't catch us.

Q. To port? A. Yes.

Q. You knew you couldn't stop the ship within that distance?

A. I wasn't sure; might have stopped her.

Q. In the face of your testimony here that you couldn't stop her within three-quarters of a mile, do you mean to say, Captain, now, when you reversed her 300 feet from the stern of the "Kern" you thought you could stop her before she reached the "Kern"?

A. In that question they didn't say anything about conditions at all—whether flood tide or ebb or the wind blowing or anything of the kind.

Q. Were you testifying to flood tide or running on ebb tide? A. Depends.

Q. At this time you answered Captain Edwards' question?

A. I didn't state any tide or any conditions. He didn't ask any conditions. [346]

Q. When you said to Captain Edwards "We was running" and he broke in on you, you had in mind the conditions that night, didn't you?

A. I don't know whether I did or not.

(Testimony of W. H. Patterson.)

Q. Now, then, Captain, when you came around Cooper's Point and gave the first signal, of one blast to the "Kern," you didn't know whether it was safe for you to go by or not, did you?

A. I did at that time, yes.

Q. You did?

A. Yes, because I could see I had this vessel on my port bow and there was an opening there; could have gone through on my own business.

Q. Did you know the conditions ahead?

A. No, as far as I could see at that time and the conditions in the—

Q. You don't know whether it was safe or not?

A. I could go there.

Mr. DENMAN.—Do you contend it wasn't safe in there?

Q. You didn't know it, did you, Captain?

A. Yes, the indications looked favorable to me—it was all right—I could go down with safety.

Q. So you continued on your course?

A. I did, certainly.

Q. Despite the fact you received no response from the "Kern"?

A. I kept on my course because she was on my port bow and I knew I could go by safely, so far as I could see.

Q. Nothing there so you couldn't get through?

A. Not at that time.

Q. Nothing why you should expect to receive a danger signal from the "Kern"?

A. No, I was not looking for a danger signal. As

(Testimony of W. H. Patterson.)

I said, supposed could go on. [347]

Q. So after you rounded Cooper's Point you continued on that belief in your own mind you were going past the "Kern"?

A. That my ship was slowed down and that we could go past her.

Q. Will you answer my question, please?

A. I answered the question.

Q. You thought at that time you would go on past the "Kern"?

A. Certainly I did. I had no reason to believe anything different.

Q. When you did not, as you testified, receive a response to the first whistle to the "Kern," was there any doubt raised in your mind?

A. Not at that time when I blowed the first whistle.

Q. Was there any doubt in your mind when you gave the second whistle?

A. No, not at that time; I was giving the second whistle, but as soon as I give the second whistle he fired the cross-whistles back.

Q. And you gave the second whistle immediately after you gave the first whistle?

A. I did, yes.

Q. Now, what was the reason you slowed down your steamer when you gave the first whistle?

A. We always slow down in passing barges. Daniel Kern asked us to do that.

Q. Then you did know, when you blew the first passing signal that the "Daniel Kern" was ahead

(Testimony of W. H. Patterson.)

with barges, and expected to pass her?

A. Could see her—boats or barges of some description.

Q. That was the reason you slowed the engine?

A. Always, sir.

Q. That is the reason you slowed your engines?

A. Certainly, always slow the engine.

Q. That is the reason, isn't it?

A. I suppose it was. [348]

Redirect Examination by Mr. DENMAN.

Q. Captain, as I understood it, the first whistle that you blew was one-whistle signal, as you passed the Point? A. Yes, sir.

Q. And the second one was when you were about fifteen hundred feet away?

A. Fifteen hundred feet away.

Mr. CAMPBELL.—If the Court please, I object to a leading question. This witness has not testified to fifteen hundred feet away at all. He said immediately after he blew the first one, he blew the second; now counsel comes along and says fifteen hundred feet.

Mr. DENMAN.—That was his direct testimony this morning.

Mr. CAMPBELL.—It was not his direct testimony.

The COURT.—I suppose this is only preliminary to another question?

Mr. DENMAN.—Yes.

The COURT.—Very well, ask it.

(Testimony of W. H. Patterson.)

Mr. DENMAN.—I am correct, am I not, that he answered twelve to fifteen hundred feet this morning?

Mr. CAMPBELL.—He said when he got the first series of two whistles, Mr. Denman, from the other vessel, he was from twelve to fifteen hundred feet away.

Mr. DENMAN.—I want to bring it out then.

Q. How many one-whistle signals, did you blow? When did you blow your first one-whistle signal?

A. When I rounded the point, like.

Q. How far were you from the point, do you suppose? A. Off the point? [349]

Q. How far from the point?

A. Just after I passed the point.

Q. Just after you passed the point; within five hundred feet of it?

Mr. WOOD.—Which way do you mean, off shore?

Mr. DENMAN.—No, no; distance from the point.

The WITNESS.—Down shore. You mean distance off, as I went by after I passed?

Q. The actual distance from your vessel to the point when you first blew the whistle?

A. Oh, probably five hundred feet. It might have been a little more.

Q. How is that?

A. It might have been a little more; I could not tell exactly.

Q. Might it have been more than a thousand feet?

A. We are supposed to blow a half a mile off, and as far as my judgment would allow me, I blew a

(Testimony of W. H. Patterson.)

whistle a half a mile off; see?

Q. The first whistle?

A. Yes, after I got around the point.

Q. Now, how far were you from her when you blew your second whistle?

A. Well, we was getting pretty well down then.

Q. A thousand feet?

A. Yes. We was further than that; between a thousand and fifteen hundred feet.

Q. When was it you got the first response from the "Kern"?

A. Right after I blowed my second whistle, just immediately after I got the second whistle,—after I blowed my second whistle, I meant to say. [350]

Recross-examination by Mr. CAMPBELL.

Q. You remember testifying before the Inspectors, do you not, Captain, that at the time you received the whistles from the "Kern" that you said, "By that time I was down on top of the man"?

A. Oh, I could not have been down there. I could not have been down on top of him. I don't remember saying that at all. I don't think I did say it either.

Q. Don't think you did?

A. No. Even if it is there, I would not believe it.

Q. What is that?

A. Even if it is there, I would not believe it.

Q. What is that?

A. Even if it is there, if I would see it in black and white, I wouldn't believe it.

Q. Can you read it in this record (counsel exhibit-

(Testimony of W. H. Patterson.)

ing transcript to witness), "By that time I was down on top of the man"?

A. Well, that meant I was getting down close to him. It didn't mean I was right on top of the ship.

Q. You did tell that to the Inspectors, "By that time, I was down on top of the man," didn't you?

A. Well, I was down close to the "Kern."

Q. What do you consider close? You gave that to the Inspectors, didn't you?

Mr. WOOD.—Read the question and answer into the record and ask him if that is not the correct testimony.

Mr. CAMPBELL.—(Reading:) "Just give a statement, Captain, [351] of the occurrence, of the matter? A. As it happened? Q. Yes, as it happened, to your knowledge. A. Well, on the 18th, I was going down the river as pilot of the steamer 'George W. Elder,' and before I come to Cooper's Point I met the 'Hercules' about a quarter of a mile this side of Cooper's Point up-river, and he was in tow of his barges, and I blew one whistle to pass to the right, which he answered, and knowing at that time that I would meet the 'Daniel Kern' with a tow down the river somewheres I was on the lookout for her, and as I rounded Cooper's Point, I picked up the 'Daniel Kern' off of Waterford Light, and I blow him one whistle, which I got no answer, and I says to the officer on the deck, 'I wonder what is the matter with that fellow?' And I blow him another whistle. Hold on; I am a little ahead of my story, there. When I blew my first whistle I slowed

(Testimony of W. H. Patterson.)

my ship down, as soon as I blowed my first whistle, and then I blew him another whistle and he didn't answer it immediately, and pretty soon he answered me with two whistles and I put—I says to the officer on the bridge to stop the ship and put her full speed astern, which was done, and then he blowed me two whistles more. By that time I was down on top of the man."

Mr. DENMAN.—Oh, by that time, after he had slowed down.

Mr. WOOD.—Oh, no, Mr. Denman; you are not testifying. Let's get this in just as it was.

The COURT.—You can make your argument later.

Mr. WOOD.—You can argue it later.

Mr. DENMAN.—I know, but I couldn't tell what he meant.

The COURT.—Read on. [352]

Mr. CAMPBELL.—(Reading:) "At the same time he had a searchlight on all the time, which blinded me and blinded the quartermaster in the wheel-house. He was throwing his searchlight around over the river, and on the barges, and up the river, and at times the searchlight was right in the face of me and the man at the wheel. When I first picked up the 'Elder,'—first, when I blowed him one whistle—Inspector EDWARDS.—(Interrupting:) You mean when you first picked up the 'Kern?' A. Yes, sir; when I first picked up the 'Kern,' I could see that I had plenty fairway on the Washington shore down the river; that is when I first sounded my one whistle; and didn't think there

(Testimony of W. H. Patterson.)

was any trouble whatever by me proceeding on the way down the river until he had blown me the two whistles. When I blowed my first whistle I said I slowed her down, and no answer. When I blowed him my first whistle I put my wheel astarboard—hold on—I put my wheel aport to go down the Washington shore, which I knowed I had plenty of room to go through, until I heard the sound of these two whistles; and I could see when he blow his two whistles to me that his barges,—it looked to me that they were headed inshore on the Washington shore, and I could see that his boat was headed in on the Washington shore, and I could see, could tell by the way he was, because I could see his mast headlights and could see his starboard lights coming in view, which would show the ship was headed inshore.” Do you remember giving that testimony?

A. Well, I guess that is right, probably. I could see the reflection. I told him the reflection.

Q. So according to your recollection at that time when the “Kern” blew you the two whistles, you were down on top of the man? [353]

Mr. DENMAN.—No.

A. I didn’t say I was down on top of him; down on top of a ship we consider when we are in a thousand or fifteen hundred feet, we are getting down close to a vessel. That is the meaning of that; that is what I meant.

Mr. DENMAN.—That is not what he stated, either.

The WITNESS.—No, I didn’t say, “I am down on

(Testimony of W. H. Patterson.)

top of him," that means a safe distance away,—that does to a seafaring man.

Q. You know, of course, that searchlight could not be turned around so as to flash upstream, don't you?

A. I don't know anything of the kind. I have never seen a searchlight yet put on a ship you could not twist plumb around. I have had experience with a good many of them for a good many years, a good many hundred and thousand of them, the ships I have been on.

Q. You don't know anything about the "Kern's" searchlight?

A. I have been on the "Kern" when she was the old "Manzanita," when it belonged to the Government, but then I could not say she had a searchlight on it; I can't. Probably Mr. Kern put the searchlight on there; I don't know.

Redirect Examination by Mr. DENMAN.

Q. Now, let me ask you, as you swing to your port, that would make the other vessel appear to swing across your bow to starboard, would it not?

A. As we would swing to port, naturally it would look as though the other vessel,—out of the bow there,—was moving ahead. You would naturally think, because we were swinging [354] over here all the time, and it would naturally make her look as though she was going the other way.

Q. So when you move your vessel around towards the point the other vessel might appear swinging towards the Washington shore?

A. The Washington shore, yes.

(Testimony of W. H. Patterson.)

Q. You heard the testimony here, as a matter of fact, the "Kern" was pointing downstream, didn't you? A. Yes, sir.

Q. That is conceded to be true, isn't it?

A. Yes, sir.

Witness excused. [355]

Testimony of W. H. Pope, for Respondent.

W. H. POPE was next called as a witness on behalf of respondent and having been first duly sworn, testified as follows:

Direct Examination by Mr. DENMAN.

Q. Captain Pope, what is your occupation?

A. Pilot.

Q. How long have you been a pilot?

A. Well, I have been on the Columbia River about twenty-five years.

Q. (By Mr. FULTON.) How long?

A. I have been on the Columbia River, working on the Columbia River as master and pilot for twenty-five years.

Q. Had your license during all that time?

A. Yes, sir.

Q. Have you ever piloted the steamer "Elder"?

A. I have.

Q. How is she to mind her helm? Is she quick or slow? A. Fairly quick.

Q. Fairly quick. Suppose you were going down the stream with the "Elder" at full speed and there was a vessel dead ahead of you five hundred feet off, pointing straight away from you, would you have any

(Testimony of W. H. Pope.)

difficulty passing her? A. I should suppose not.

Q. Presuming now, everything is clear on the starboard side of her, would you have any trouble passing her to starboard?

A. Any trouble to pass to starboard? [356]

Q. Yes. Suppose it is all clear on the starboard side. A. No, sir.

Q. And she is dead ahead of you five hundred feet off, how much do you think you could pass her, how much room could you give her in five hundred feet?

A. Plenty of room to clear.

Q. Plenty of room to clear. Now, suppose you put her back a thousand feet and you begin your maneuver there, would you have any difficulty passing her to starboard? A. No, sir.

Q. Is there any rule of this river, which gives a barge, or a tug with barges, the right to hold up a vessel coming downstream when there is room to pass her?

Mr. CAMPBELL.—If the Court please, we submit that calls for a conclusion of law on the part of this witness.

Mr. DENMAN.—I asked him for the rule of the river, if there is any rule of the river in passing.

A. Not that I know of.

Q. Which way will the "Elder" swing? What sort of a wheel has she, a right-hand or left-hand wheel? A. She has got a right-hand wheel.

Q. What, the "Elder"? A. Oh, the "Elder"?

Q. Yes, the "Elder." A. A left-hand.

Q. She has a left-hand wheel. What course will

(Testimony of W. H. Pope.)

the vessel take if she is going full speed ahead and you reverse full speed astern with her, to her port or starboard?

A. She will throw her stern to starboard.

Q. And her head? A. Her head to port. [357]

Q. To port; and what will her course be, to port?

A. To port.

Cross-examination by Mr. CAMPBELL.

Q. Do you think it would take three-quarters of a mile to stop the "Elder" when she is going full speed ahead in slack water?

A. Well, that is a pretty hard question to answer exactly.

Q. Well, if Captain Patterson testified,—

A. (Interrupting.) I have never tried her exactly, how far.

Q. Captain, is there any rule on the river that permits an overtaking vessel to pass an overtaken vessel without the consent of the overtaken vessel?

A. The rule of the road—

Mr. WOOD.—(Interrupting.) No, we are asking for the rule of the river; not for the law, but for the rule amongst river men. We know what the law is.

Mr. FULTON.—We doubt that.

Mr. WOOD.—You are at perfect liberty to doubt it.

The WITNESS.—We are supposed to follow the law, sir.

Mr. DENMAN.—We don't contend that there is. We don't contend that we had any right to attempt to pass to the starboard if there was anything there

(Testimony of W. H. Pope.)

that warranted giving us a stop signal, four-whistle signal.

Q. Captain, if you were pilot of a vessel which could not be stopped from full speed ahead within three-quarters of a mile, would you run down to within a thousand feet of a steamer ahead without stopping your ship before you got consent to pass her? [358]

Mr. DENMAN.—Presuming there is plenty of room to pass.

A. When I am approaching a vessel to pass, if I get a danger signal, I put my vessel full speed astern and I answer with three blasts of the whistle to let the other party know that I am backing.

Q. And you aim to give your passing signal at sufficient distance astern of that vessel that you are overtaking, so that if you do get a danger signal, you can stop her before you reach her, don't you?

A. That is the idea. At the same time, sometimes it is pretty hard to do.

Q. But that is what you aim to do? A. Sure.

Q. When you don't get the permission to pass, you don't continue on your course right down on to her, do you? A. Try not to.

Redirect Examination by Mr. DENMAN.

Q. Now, Captain, suppose you are coming down the stream and you see a vessel ahead and you blow one whistle; she is off on your port bow, but pointing the other way, and there is plenty of room to pass her on the starboard side; you blow one whistle and don't get any response and you slow your engine and go on,

(Testimony of W. H. Pope.)

and then blow a second whistle, and then you get a response which is a cross-signal or four whistles, would you then put your propeller full speed astern?

A. I surely would.

Q. Now, would you consider that that was a proper maneuver, described as a whole? [359]

A. That is the only method that will protect a pilot. When he gets a danger signal, he is required to put his vessel full speed astern.

Q. Now, suppose you are a half mile away and you blow your one whistle, you don't get any response, you slow down—that is the proper thing to do, slow down, isn't it? A. Yes, sir.

Q. And then blow another whistle to see if he didn't hear the first, that is what you do, isn't it?

A. I should do so.

Q. And that is all right up to that point, isn't it?

A. Sure.

Q. Then if you get a response of four whistles, that would indicate, that if the way was clear to the right, that the other fellow must see something in that way that would hinder you, wouldn't it?

A. I suppose so.

Mr. CAMPBELL.—If the Court please, that is not asking an expert opinion, but it is putting the answer in the witness' mouth. It is a leading question and not asking for an expert opinion.

Mr. DENMAN.—I am asking what interference would be drawn where the passage looks clear to you and you get four whistles indicating you can't get through there, whether that would not indicate that

(Testimony of W. H. Pope.)

there was something in there which you could not see that the other fellow could?

A. That would indicate danger.

Q. Yes; and if the passageway was clear to you, that would indicate the danger to the other fellow on the passageway [360] that you didn't see, wouldn't it?

A. I would suppose there was either something in the way or he was in the way or would be in the way.

Mr. CAMPBELL.—It would indicate to you there was something in the mind of the vessel ahead which he thought made it improper for you to attempt to pass him as you had indicated by your whistle you desired? A. Sure.

Q. Of course, if there was nothing there to stop you in the fairway, he would have no right to refuse you to go through, would he? A. No.

Mr. CAMPBELL.—Again that is a question of law.

Recross-examination by Mr. WOOD.

Q. No matter how wrong or foolish he was, you would have no right to force your way through against his danger signal?

A. If it was broad daylight and I saw my way clear through I should pass ahead; I should go through. I would exercise the right. But in the night, I should not attempt to go through, because it is impossible for us to see so very far ahead.

Q. And if he happened to have a submerged spar that you didn't see and you carried it away and injured his vessel, you would be in the wrong for disre-

(Testimony of W. H. Pope.)

garding his signal, wouldn't you? A. Sure.

Q. You have handled the "Elder" a good many times? A. Yes, sir. [361]

Q. How far will she swing to port off the right line in going full speed ahead in slack water with her helm hard astarboard set at the beginning of the thousand feet line?

A. Well, she would go at least three points.

Q. And in a thousand feet, how many feet would that make perpendicular to her line of crossing?

A. Well, I would say broad off, off on the beam.

Q. Can you make a guess?

Mr. DENMAN.—He said broad off on the beam.

The WITNESS.—I said she would go a fourth of the way around, at least.

Mr. DENMAN.—In a thousand feet, she would be broad off on the beam? Yes. Then if at the same time the helm was set to starboard, the reverse signal is given and the engines are set full speed astern, the wheel full speed astern, that would have a tendency to throw her stern to starboard and her bow to port, too, wouldn't it? A. Sure.

Q. Now, that would accentuate the bow movement toward the port, or check it, she still going through the water? You see, to make it clear, I will say she was going full speed ahead and at the same instant, her helm was thrown hard astarboard and the reverse signal given and the propeller set full speed astern, now in a thousand feet, will she swing more to the port under those circumstances, than if her propeller had not been set astern?

(Testimony of W. H. Pope.)

A. She won't always do that. I have known vessels that backed to port, when they would get a little swing on a starboard helm to go off just the opposite.
[362]

Q. I am talking about the "Elder." You said you were familiar with it? A. I am.

Q. Now, she has a left-handed propeller?

A. Yes, sir.

Q. And therefore when backing, her stern swings to starboard? A. Yes, sir.

Q. And her bow to port? A. Sure.

Q. Now, then, what I mean is when her helm is to starboard and her bow going to port by the helm also, she is reversed full speed astern, won't that help the port movement of the bow?

A. Yes, sure; although they will sometimes swing much faster backing than they will at other times. You can't bet on them always on the stern movement.

Q. I am talking about the "Elder."

A. Well, I am talking about any steamship.

Q. All we want, this is the "Elder" on trial here.

A. Well, I will say the "Elder."

Q. Yes, say the "Elder."

A. Sometimes she will back quicker than she will at other times on the stern movement.

The COURT.—How do you account for that, Mr. Pope?

A. All vessels are the same. Sometimes it is the current, sometimes it is one thing, sometimes another.

The COURT.—Suppose she was in slack water,

(Testimony of W. H. Pope.)

would she back quicker?

A. Then in perfectly slack water, she ought to back to starboard. [363]

Mr. DENMAN.—One moment. She ought to back to starboard?

A. The stern will go to starboard.

Mr. DENMAN.—Yes.

Q. (Mr. WOOD resuming.) Now, Captain, when a vessel is lying still in slack water, and the “Elder,”—we will talk about the “Elder,”—when the “Elder” is lying still in slack water and her propeller is set full speed astern, long before she has got headway—

Mr. DENMAN.—(Interrupting.) Sternway.

Q. (Continuing.) Sternway, the stern commences to swing to starboard almost with the first revolution, doesn't it? A. Yes, sir.

Q. So that with that lateral movement, the push of the stern over to starboard commences immediately with the first turn of the propeller? A. Yes, sir.

Q. Therefore, wouldn't it be a fact that the vessel still having headway as I have said, just shut off from full speed, and the helm set hard astarboard and then the reverse signal given and the propeller set hard reverse, that that would accentuate the bow movement to port?

A. You mean a vessel going about twelve miles an hour?

Q. Yes, twelve miles, or from ten to twelve.

A. If you let that get a little swing with the helm and then back them, why, of course, it will; but if you

(Testimony of W. H. Pope.)

are going dead ahead, straight ahead and commence to back, it will be some little time before she will make any move at all.

Q. With both the helm hard over and the backing?
[364]

A. As I say, she will have to get part of her way off before she will back to starboard.

Q. I am talking about the swing of the bow to the port and the helm hard astarboard?

A. Yes, if you let the steamer go until she is on a swing, before you go to backing her, she will swing quickly.

Mr. DENMAN.—You mean let the rudder catch?

A. Let the rudder—throw your rudder hard astarboard and let her get a swing, a slight swing, then it is all right; but if you go to backing immediately, the rudder thrown hard astarboard don't do so very much good.

Q. What I mean is this: With the helm hard astarboard, does the backing of the propeller help the swinging of the bow to port, or stop it?

A. In dead slack water, if you had your helm astarboard, it would have a tendency to hold her steady. She would go straight astern almost.

Q. That is, when she starts from a position of stationary? A. Perfectly stationary.

Q. Well, now, that is not the question. She has got headway and therefore she has got steerageway?

A. Yes, sir.

Q. The helm is hard astarboard and therefore, having steerageway, her bow is under the influence of

(Testimony of W. H. Pope.)

that swinging to port?

A. If you let her get a start to swing, and then go to backing, sure; but if you go to backing immediately and put your helm hard astarboard, it will take a little while for her to begin to swing.

Q. Even when she has got headway?

A. Yes, sir. [365]

Q. All right. Now, then, would the swing be less if you did not start the propeller than if you did?

A. How is that?

Q. Suppose you did not start the propeller at all, simply left it to the helm? A. To the helm?

Q. Yes, would that swing the greater or less than if both the helm and the propeller were working?

A. She would start off with her helm quicker.

Q. Which would the swing, though, I mean be more?

A. Without backing until she got to swinging. A vessel to swing quickly wants to feel the rudder and then go to backing,—

Q. (Interrupting.) I understand that. Now, you have said that and made that clear. Now, I am saying that, having started to swing, which will she swing quicker, under the influence of just the helm alone, or with both the helm hard astarboard and the propeller reversed?

A. Well, she ought to swing—if a person had plenty of searoom and let the vessel go ahead, she will swing quicker than she will with the helm astarboard and backing; but if you can't drive a vessel ahead, if you have got no room ahead, then you do the best by backing.

(Testimony of W. H. Pope.)

Q. Well, I must confess, it has not been made clear to me yet, the question I have asked. I say, with a vessel going practically full speed, we will say ten miles an hour, through slack water and the helm hard astarboard, and she had commenced to swing and got her swing, will it help that swing or hurt it by reversing the propeller full speed astern? [366]

A. Well, it is pretty near a standoff.

Q. It doesn't make any difference?

A. I said it is pretty nearly a standoff.

Q. How do you reconcile that with the fact that the lateral movement or thrust of the propeller is to send her stern to starboard and immediately commences to reverse?

Mr. DENMAN.—You mean when she is moving or at a standstill?

Mr. WOOD.—Moving.

A. The vessel backs to starboard.

Q. Yes; and that thrust takes effect immediately that the propeller commences to turn?

A. Yes, sir.

Q. Now why, then, doesn't that aid the movement of the bow to port,—

A. (Interrupting.) I mean you reverse your engine and throw your vessel astern, you lose your steerageway with the rudder, as far as the rudder is concerned.

Q. You don't lose it for some time, do you?

A. No, not for some time, but the minute the vessel goes astern—

Q. (Interrupting.) But she is not going astern.

(Testimony of W. H. Pope.)

A. I know she is not going astern, but I mean if her propellers.

Mr. FULTON.—The propeller, you mean.

A. The propeller has a stern movement, she is backing, in other words.

Q. Yes, she is backing, but she is going through the water ahead?

A. If you stop a vessel when she is going at the rate of [367] twelve miles an hour and throw your helm hard astarboard, she will turn pretty quickly herself, let her go. Now, then, on the other hand, if you go to backing, she will back to starboard, but you lose your headway and lose your steerageway with your rudder, as far as your rudder is concerned.

Q. Which loses the most, the propeller or the helm?

A. Well, I said they were pretty near a standoff.

Q. Well, then, if they are pretty near a standoff, it seems to me you have got two forces to work sending the stern around to starboard instead of one; isn't that so?

A. And I said when the vessel was going ahead and you went to backing her, you lost your steerageway as far as the rudder is concerned.

Mr. DENMAN.—How is that, by the disturbance of the waters at the rudder?

A. Well, you stop her way; you stop her steerage.

Mr. DENMAN.—Suppose she is going ahead still, with the water being disturbed by the propeller, does that effect the grip of the rudder on the water when you are reversing? A. Not necessarily so.

(Testimony of W. H. Pope.)

Q. (Mr. WOOD resuming.) Now Captain, can you state about how far the "Elder" herself would swing in a thousand feet with the helm put hard astarboard and the propeller, reversing and she was going at a speed of ten miles an hour, we will say, in slack water?

A. Oh, I could not tell exactly how much she would.

Q. No, of course nobody can tell exactly. About how much? You can guess at it.

Mr. FULTON.—Will you read that question, please.

(Question read.) [368]

Mr. WOOD.—That is, she had that speed at the time the maneuver or operation was commenced, going through slack water ten miles an hour, the helm is put to starboard and the wheel reversed, how far will the bow swing to port in a thousand feet?

A. Well, she ought to swing from a point and a half to two points.

Mr. WOOD.—All right, that is all.

Redirect Examination by Mr. DENMAN.

Q. And what would that be, two or three hundred feet off of your line, or more?

A. A vessel going straight ahead, she ought to swing in that direction,—what do you mean?

Q. Would it be two or three hundred feet off the straight line ahead to port, that it would have gone over, or would it be more than that, three or four hundred feet?

A. Well, she ought to be,—in a thousand feet?

(Testimony of W. H. Pope.)

Q. Yes.

A. She ought to go one hundred and fifty feet off.

Q. That is an estimate; maybe more and maybe less?

A. Yes, sir.

Witness excused. [369]

Testimony of Edward Whiteman, for Respondent.

EDWARD WHITEMAN was next called as a witness on behalf of respondent and having been first duly sworn, testified as follows:

Direct Examination by Mr. DENMAN.

Q. Captain Whiteman, how long have you been at sea?

A. Since I was fourteen years old.

Q. And how old are you now?

A. Fifty-seven—going on fifty-eight.

Q. What papers do you hold?

A. Chief mate on ocean steamers.

Q. How long have you been that?

A. Fifteen or sixteen years.

Q. Were you a mate on the “Elder”?

A. I am third mate.

Q. How long had you been that at the time of this collision?

A. That was the second trip.

Q. That was the second trip. Have you been on her since that time?

A. Afterwards I was, with two or three months between. I was only there temporarily at that time.

Q. I see; then afterwards you came on her?

A. In the fall, yes.

Q. You are familiar with handling her, are you?

A. Yes, sir.

(Testimony of Edward Whiteman.)

Q. How does she swing when you are going ahead at full speed and then reverse full speed astern, which direction will she swing in? [370]

A. She will swing to port; she has got a left-handed wheel, that is, her bow will swing to port.

Q. Her bow will swing to port. Will she make a curving course to port? A. Yes, sir.

Q. As she goes ahead? A. Yes, sir.

Q. Until she is dead in the water? A. Yes.

Q. How does she mind her helm?

A. Quick. That is, when she is in right trim.

Q. What trim was she in on the night of this collision?

A. About four feet by the stern, I should judge.

Q. That was her proper trim to handle her in?

A. Fine trim; yes.

The COURT.—Just a moment. What do you mean by four feet by the stern?

A. Well, she drew four feet more water aft than she drew forward.

Q. How long a vessel is she?

A. Two hundred and fifty feet.

Q. Two hundred and fifty feet. And were you on watch at the time of the collision?

A. I was, sir.

Q. You recollect passing Cooper's Point and coming in sight of the tug and barges on beyond?

A. Yes, sir.

Q. After you had rounded Cooper's Point and sighted them, what course did you steer?

(Testimony of Edward Whiteman.)

A. After we got straightened out, we were steering down for Waterford Light. I think that is the name of it. [371]

Q. And what place were you steering for with reference to those barges?

A. We were steering inside of her, so we had her on the port bow.

Q. So you had her on the port bow? How long was she on your port bow?

A. Well, until she cross-signalled us. We got cross-whistles.

Q. And how far were you away from her when she cross-signalled?

A. Somewhere about twelve hundred feet.

Q. What did you do then?

A. Reversed the engines and put her full speed astern.

Q. And what did you do with your helm, if anything? A. Put her hard astarboard.

Q. What was the result of that?

A. To make her swing, her stern swings to starboard and her bow swings to port.

Q. And what course would she take through the water?

A. Why, kind of a curving course like that (witness illustrating), she was going, she had headway on her so she would go like that (illustrating).

Q. She struck the "Elder," didn't she, on that course. She struck the "Kern" on that course, didn't she?

A. On a swinging course, yes, sir.

(Testimony of Edward Whiteman.)

Q. And did you have a lookout on your vessel?

A. Yes, sir.

Q. The quartermaster at the wheel?

A. Yes, sir.

Q. Was your course clear between your vessel and the Washington shore,—between the “Kern” and the Washington shore, as you came down? [372]

A. Yes, plenty of room.

Q. As far as you could see?

A. Plenty of room.

Q. How did you start this movement to go astern? What signals did you give?

A. Full speed astern on the engines.

Q. On the engines; and how did you accomplish that?

A. Why, by ringing the telegraph. I rang several times so as to let the engineer know that I wanted all she could stand.

Q. Did you keep that up until she struck?

A. Almost.

Q. Do you know of any rule on this river which permits a tug and tow to hold you up from passing through clear water if there is nothing ahead to obstruct you?

Mr. CAMPBELL.—I object to that, if the Court please, as being immaterial.

A. Not according to the—

Q. (Interrupting.) Do you know of any rule on the river, I mean, to that effect? A. No, sir.

Q. Well, suppose now you were coming downstream,—suppose you had been right behind the

(Testimony of Edward Whiteman.)

“Kern” instead of being off to her starboard and you are five hundred feet from her, with the speed at which you were going, would you have any difficulty in clearing her to starboard from that point?

A. That is two ship lengths; no.

Q. Now, suppose at that thousand feet, would there be any question about it?

A. Not at all. [373]

Cross-examination by Mr. CAMPBELL.

Q. Captain, what was your reason for keeping ringing on the telegraph full speed astern?

A. My reason was to let the engineer know that I wanted all,—I wanted the valve wide open so as to give her all she could stand on the reverse gear.

Q. Didn't you mean that when you rang her full speed astern the first time?

A. Well, I wanted to impress on him it was necessary to give her all she could stand; we do that all the time.

Q. What was the necessity of that?

A. To impress on the engineers that I wanted her wide open.

Q. But what was the rush about it? What was the reason for it?

A. Because I could see we could hardly avoid a collision.

Q. That was because you could see at that time you were so close to the “Kern,” you would have to have all the steam you could get for you to stop her?

A. Exactly.

(Testimony of Edward Whiteman.)

Q. And even then, there was very grave doubt in your mind as to whether you could stop her?

A. Well, there was.

Q. You say the "Kern" blew two whistles?

A. I was under the impression that she blowed two whistles twice, with a short interval between the two.

Q. But you could not tell whether it was two whistles twice or whether it was four whistles once, could you? [374]

A. Well, I am kind of in doubt about that, but I was under the impression that it was two whistles twice.

Q. But still the interval between them was so short as to leave a doubt in your mind?

A. Oh, yes; there is room for a doubt.

Q. You saw the lights, the towing lights of the "Kern" before you gave your first one-whistle signal, didn't you? A. No.

Q. Didn't you?

Mr. DENMAN.—The towing lights?

A. The towing lights?

Mr. DENMAN.—Yes.

The WITNESS.—What do you mean, her mast-head lights?

Mr. WOOD.—Never mind, Mr. Denman. He heard the question. Didn't you hear the question?

Mr. DENMAN.—He didn't understand it.

Mr. WOOD.—What did you understand the question to be?

The WITNESS.—I understood the question to be her towing lights, her masthead lights. That is

(Testimony of Edward Whiteman.)

what you mean by towing lights?

Q. (Mr. CAMPBELL, Resuming.) Well, you saw those before you blew the first whistle, didn't you?

A. No.

Q. You testified before the Inspectors, didn't you?

A. I did, two years and a half ago.

Q. Yes. Your recollection was probably fresher at that time than it is now, wasn't it, Captain?

A. In some instances, it was, yes.

Q. Well, it would be with respect to the lights, wouldn't it, [375] the time that you saw the lights? A. Yes, sir.

Q. This question was asked you by Mr. Fulton: You remember Mr. Fulton being there? A. I do.

Mr. DENMAN.—What page?

Mr. CAMPBELL.—On page 143. He asked you these questions: "Q. What lights did you notice on the 'Kern'? A. I noticed his two towing lights, two masthead lights. Mr. FLANDERS.—When was this?"

Mr. CAMPBELL.—Do you remember Mr. Flanders? A. I do.

Mr. CAMPBELL.—And he asked you this: "When was this? When did you notice his two lights? A. I noticed that when we blew the first whistle. Q. Did you see the side lights? A. I didn't notice any side lights." That was correct, wasn't it?

A. Well, that was nearly correct, but I think I stated something afterwards that by the towing lights I meant I seen the reflection of his towing

(Testimony of Edward Whiteman.)

lights, not the towing lights, but the reflection of them.

Q. Yes; but you saw those at the time you blew the first whistle?

A. The reflection of his towing lights?

Q. Yes; so you knew the "Kern" was down there?

A. That she was heading down towards the river, because they wasn't staring me full in the face; she wasn't heading up the river; I knew that.

Q. But you knew it was the "Kern" down there with the barges? A. I didn't know who it was.

Q. How long had you been on the "Elder" prior to that time? [376]

Mr. DENMAN.—Two trips, he said.

A. That was the second trip.

Mr. CAMPBELL.—Oh, the second trip. I thought you had been regularly on her. That is all.

Redirect Examination by Mr. DENMAN.

Q. You say you blew one approaching passing signal first; did you get any answer to that? A. No.

Q. Where was it you blew that?

A. We blew that when we was rounding Cooper's Point on the starboard helm.

Q. And then you continued on and then you blew,—what did you do after you continued on?

A. Immediately after we blew the first whistle and he didn't answer, I slowed the ship down dead slow.

Q. Then what did you do?

A. Kept on our course.

Q. Then what did you do?

A. Then we blew one more whistle.

(Testimony of Edward Whiteman.)

Q. Yes; you got no response to the first whistle?

A. No response whatever to the first whistle.

Q. Then you blew a second whistle?

A. A second whistle.

Q. Then what came?

A. Then came, as I stated, the two short whistles twice.

Q. What did that indicate to you?

A. It indicated to me that he either wanted us to pass, to go over on the other side, on the Oregon side of him, or else [377] there was an obstruction in the river that I could not see,—that there was danger somewhere.

Q. What did you have to do on the first theory, that he wanted you to go to the left, that there was danger somewhere; what did you have to do?

A. Well, we were so close to him that the only thing we could do was to stop and reverse full speed astern.

Q. For either theory, on either theory?

A. On either theory, we could not do anything else.

Q. Could you tell whether this obstruction, which the whistle indicated, was directly to the starboard?

Mr. CAMPBELL.—If the Court please; I object to counsel constantly inferring in his questions that these whistles indicates obstructions. I think it is a matter for the Court to determine what the danger signal indicated, and not for this counsel to constantly put in the mouths or the minds of these witnesses that it indicated obstructions.

Mr. DENMAN.—One moment. That is not ex-

(Testimony of Edward Whiteman.)

actly what I did. I asked him what it indicated to him.

Mr. CAMPBELL.—Read the question.

Mr. DENMAN.—My last question follows up the first, which was what it indicated to him; he gave an answer; he said that that indicated something alongside or an obstruction in the river that he could not see.

The COURT.—You may answer the question.

A. To my mind, it indicated there was an obstruction somewhere that would not allow us to pass in the direction that we had signalled to him that we wanted to pass.

Q. Could you tell whether that was alongside or behind the other vessel? [378]

A. No, sir.

Q. What were you doing after you began to reverse full speed astern? What were you personally doing on the bridge?

A. What was I personally doing?

Q. Yes.

A. I stood right there by the telegraph.

Q. What were you doing; how were you occupied?

A. After I rang for full speed astern, I stood there with my hand on the telegraph.

Q. Where did you look? A. Right ahead.

Q. What for?

A. Why, to see what was going to happen.

Q. Were you looking for the obstruction?

A. Sure.

(Testimony of Edward Whiteman.)

Recross-examination by Mr. CAMPBELL.

Q. Why didn't you blow the danger signal, Captain, when you didn't get a response to your first one whistle?

A. Why, I didn't blow the danger signal.

Q. Why wasn't the danger signal blown?

A. From us?

Q. Yes.

A. There was no danger as far as we were concerned.

Q. Doesn't the law require you to blow the danger signal if you don't get an answer to your passing signal?

A. No, sir; the law requires us to repeat it.

Q. How soon did you repeat it?

A. I suppose a couple of minutes or so.

Q. A couple of minutes? [379]

A. When he didn't give us a response to our first whistle, I slowed the ship down and then blew again the same signal, one whistle to indicate that I wanted to pass on his starboard with our port side, between him and the Washington shore.

Q. Who told you to slow her down?

A. The pilot.

Q. What revolution was she making when you slowed her down? A. I don't know.

Q. You don't know? How many had you been running before that, fourteen miles?

A. No; you couldn't get fourteen miles out of her in a month of Sundays.

Mr. DENMAN.—Miles, or knots?

(Testimony of Edward Whiteman.)

A. Knots, of course.

Q. What would you say if the Captain testified before the inspectors she would make fourteen miles?

A. I would say that the captain was mistaken.

Q. What about the pilot? A. Also.

Q. Well, now, you say that two minutes elapsed between your first whistle and your second whistle?

A. Well, I could not say exactly like that, but something like it, I presume.

Q. You would not say that the pilot here was wrong when he said the second whistle was blown immediately after the first, would you?

Mr. DENMAN.—I think you are mistaken about that.

A. Immediately after the first? Oh, yes, I would.

Q. You would say he was wrong? [380]

A. I would say he was wrong if he said immediately after. That is, the one whistle and then right after, another?

Q. Well, a short interval.

A. Well, what do you call a short interval?

Q. I am out on the witness-stand; you are.

Mr. DENMAN.—He has a perfect right to ask you what you mean by the question.

The WITNESS.—Well, you are asking the question.

Mr. DENMAN.—That is perfectly fair. What do you mean by a short interval? Put it in minutes or seconds.

Q. What was the interval, Captain?

Mr. DENMAN.—He stated it was two minutes.

(Testimony of Edward Whiteman.)

A. Well, I should say something like anything between a minute or a minute and a half, something like that. I wasn't counting the time on my fingers; I had enough to look at without that.

Q. I thought you were just working the telegraph.

A. Well, that is all right. You go there and work the telegraph close to a collision, you will see where you will be.

Q. Oh, you were close to a collision at that time?

Mr. DENMAN.—Which time is this you are referring to?

Mr. CAMPBELL.—I don't like to show any impatience with counsel, but I don't think it is perfectly proper for,—

Mr. DENMAN.—(Interrupting.) It is perfectly fair at this time.

The COURT.—Mr. Denman, I understand he is following up this matter, talking about one thing.

Mr. DENMAN.—But, your Honor, there are two times referred to. The witness was referring to the time after he had given [381] the second signal; Mr. Campbell is referring to the time the first signal was given; and the witness said he could not answer the question. Now, the record will show that.

Mr. CAMPBELL.—Counsel has a very adroit way of breaking in just at the moment you are getting information from the witness you are seeking, a very skillful way, and we are all used to it, if it please the Court. We try to exercise patience, but sometimes

(Testimony of Edward Whiteman.)

that is hard. Will you read the question, please?

(Last question read.)

A. Well, by that time I mean the second signal. We wasn't close to the collision when we gave the first whistle.

Q. But you continued on running towards this vessel without a response at all?

Mr. DENMAN.—When? From when?

Q. You continued running on towards this vessel without a response to your whistle?

A. To which whistle do you mean, the first whistle?

Q. Which whistle did you get a response to?

A. We got a response to the second whistle.

Q. Well, then, which whistle was it you didn't get response to? A. The first whistle.

Q. Then did you continue running on towards her?

A. After slowing the ship down, yes, sir; but we were clear of him; we had him on the port bow.

Q. You did? How far?

A. Oh, about half or three-quarters of a point.

Q. And how far would that bring you off the Washington shore? A. Off the Washington shore?

Q. Yes. [382]

A. Well, it would have brought us away off, clear of the Washington shore. We were all right as far as the Washington shore was concerned.

Q. Bring you about four hundred feet, would it?

A. Yes.

Q. And if you had her a point or three-quarters of a point on your port bow, that would shut out your green light, from her, wouldn't it?

(Testimony of Edward Whiteman.)

A. Our green light?

Q. Shut out your green light from the "Kern," wouldn't it? A. It should, yes.

Q. And if it didn't shut your green light out, then you didn't have her a point or three-quarters on your port bow? A. No, we didn't.

Q. If you saw a vessel coming down astern of you a thousand feet away, showing all three lights, would you think a collision was imminent?

Mr. DENMAN.—A thousand?

Q. If you saw a vessel coming down astern of you, showing all three lights, and when you were a thousand feet distant, would you think there was danger of collision? A. Yes, sir.

Q. What would you do?

A. It was according to which—

Q. (Interrupting.) Which vessel you were on?

A. No, not exactly which vessel I was on,—how much room I had.

Q. If you were on the vessel being overtaken, you would blow the alarm signal, wouldn't you?

A. Not if I got the right passing signal from the vessel [383] that was overtaking me; it was my duty to respond to his signal and let him pass the way he designates to me that he wants to pass.

Q. It is your duty not to attempt to pass until he gives you permission to do so? A. No.

Q. Is that right? A. That is right.

Q. Now, supposing that you saw a steamer coming right down straight at you a thousand feet away, showing all three lights, wouldn't you think there was

(Testimony of Edward Whiteman.)

some danger of collision?

Mr. DENMAN.—He just answered that question.

Mr. CAMPBELL.—Well, let him answer again, Mr. Denman.

A. I guess I did answer it, didn't I? I said yes.

Q. Did you blow a long whistle before you rounded Cooper's Point?

A. We were just rounding Cooper's Point when we blew the whistle.

Q. Yes, but did you blow a long blast that is required for a steamer approaching a bend before you reached Cooper's Point? A. There was no bend.

Q. Well, then, you could see the "Kern" above Cooper's Point, could see the lights on the water?

A. I could see some lights of a boat, I didn't know what it was.

Q. That is, when you were above Cooper's Point?

A. Just coming to Cooper's Point.

Q. When you were above it, I say.

A. When we were above it, yes, a little above it.

[384]

Q. Before you made your turn?

A. Before we made the turn. There is not much of a turn to make, anyhow.

Q. That was between Eureka Cannery and Cooper's Point, you mean?

A. Yes. Well, a little above the Point.

Q. And you afterwards saw the lights that turned out to be the "Kern"—you saw the lights that turned out afterwards to be the "Kern's"? A. Yes.

Q. The law requires you to blow one long blast if

(Testimony of Edward Whiteman.)

you are coming to a bend you can't see ahead, doesn't it?

A. The law requires us to blow one long blast of the whistle when we turn a curve like this. (Witness illustrating.)

Q. So you can't see ahead?

A. So you can't see ahead.

Q. When you get to a curve that bends so much you can't see ahead, then the law requires you to blow one long blast? A. Exactly.

Q. The turn at Cooper's Point is not that sharp?

A. No, sir.

Q. So when you are above Cooper's Point, you can see your course below Cooper's Point?

A. Yes, sir.

Redirect Examination by Mr. DENMAN.

Q. Suppose, now, you were on the "Kern" that night and you saw the "Elder" coming down,—you didn't see the "Elder" at all; suppose, now, you are in the pilot-house looking ahead, watching and making the lashings on, and you hear one whistle; [385] you turn around and you see a vessel a thousand feet off and it is perfectly clear between you and the Washington shore, eight hundred feet, would you then from the "Kern" regard there was any danger?

A. No, sir.

Q. Why?

A. Well, because there was lots of room to go between me,—you put me on the "Kern," now, do you?

Q. Yes.

A. There is lots of room between me and the shore in the channel so as to clear.

(Testimony of Edward Whiteman.)

Q. Now, if you gave back one whistle in reply, there would be no danger of collision at all, would there? A. Not a bit.

Q. When you say there was danger of collision when the vessel was a thousand feet away from you, you had reference to a condition where there was no exchange of signals? A. Exactly.

Mr. CAMPBELL.—It is for the vessel ahead to determine whether it is safe to pass, isn't it? Isn't that what the law provides? A. Yes, sir.

Q. He hasn't got a right to hold you there if it is safe, has he?

A. She hasn't got a right to cross-signal me under any condition, if there is a safe passage.

Recross-examination by Mr. CAMPBELL.

Q. She had no right to cross-signal you in any event, then? A. Oh, yes. [386]

Q. You can blow cross-signals?

A. She has got a right to stop me from passing if there is danger for me to pass.

Q. How does she do that, by cross-signals, or by danger signals? A. By danger signals.

Q. But she has no right to blow cross-signals? Has she? A. No, but they do it.

Mr. DENMAN.—That is to say, they blow the cross signals to indicate you take the other side?

A. Yes.

Mr. DENMAN.—That is an improper thing to do, but they do it right along?

A. Certainly. We didn't have any room to get on the other side when he did give me the cross-signal.

Witness excused. [387]

Testimony of Harl Asktedt, for Respondent.

HARL ASKTEDT was next called as a witness on behalf of the respondent, and having been first duly sworn, testified as follows:

Direct Examination by Mr. DENMAN.

Q. You are known as Murphy on the ship, aren't you? A. Yes, sir.

Q. What position did you have on the "Elder" on the night of the collision?

A. I was quartermaster of her at that time.

Q. And where were you as you came down the river that night before the collision—where were you?

A. In the wheel-house, steering the ship.

Q. In the wheel-house, steering the ship. Was there a lookout on the vessel? A. Yes, sir.

Q. Who was on the bridge?

A. Mr. Whiteman and the pilot, Mr. Patterson.

Q. Do you know of anybody else being up at that time? A. No, sir.

Q. Did you give any signals to the "Kern," as you approached her, did you give any signals?

A. Yes, we give—

Q. Did you give any? A. Yes, sir.

Q. What course did you pursue towards the "Kern" after you rounded Cooper's Point?

A. Well, so far as I remember at that time, I see some lights. We had the "Kern" about a half a point on the port bow. [388]

Q. Did you keep on that course down towards her?

A. Yes, sir.

Q. Where did you blow your first signal to her?

(Testimony of Harl Asktedt.)

A. Well, I can't remember the time.

Q. What place?

A. Or the place. I was too busy to attend to the wheel. I don't remember that now.

Q. Well, was it before or after you got to Cooper's Point? A. I don't remember that now.

Q. How long was it before the collision?

A. The first time we blowed the whistle—well, I can't remember that now. It is a long time ago. I don't remember.

Q. Do you know when you blew the second whistle, how far you were from her when you blew the second whistle?

A. Well, about three-quarters of a mile, or something like that.

Q. When you blew the second whistle?

A. No. Then was the first whistle.

Q. Yes. When did you blow your second whistle? How close were you?

A. Well, about an eighth of a mile.

Q. Well, an eighth of a mile from her?

A. Yes.

Q. And do you know what happened then?

A. I got the command to put the wheel apart and then hard starboard.

Q. Hard astarboard? A. Yes, sir.

Q. Were there any commands given to the engine-room? [389]

A. I heard Captain Patterson *sign* out loud to the third mate on the bridge, the officer on watch, to stop her and full speed astern.

Q. Do you know whether that order was executed?

(Testimony of Harl Askstedt.)

Do you know that they did that? Did they do that?

A. Yes, sir.

Q. Could you feel the vessel reversing?

A. Well, I could not make that out. She reversed all right.

Q. She reversed. What direction would that take her?

A. Well, the "Elder" is a left-handed wheel, propeller, and it makes her bow swing to port and stern to starboard.

Q. You finally struck the "Kern," did you?

A. Yes, sir.

Q. Did you get any response to your first whistle? Any answer?

A. So far as I remember, we did get no answer to the first whistle. Then we blowed another whistle. And so far as I remember, there was either two or four; I can't make out if it was two whistles twice or four whistles.

Q. That the "Kern" responded to you?

A. Yes, sir.

Q. And how soon after you got those four whistles did you put her astern?

A. So soon as we got that signal.

Q. How does the "Elder" mind her helm? Is she quick or slow?

A. Well, to be hand-steering and cog-wheels, she handles very good.

Mr. WOOD.—May I ask a question? I didn't hear very well. You say she was hand-steering with cog apparatus? A. Yes, sir. [390]

(Testimony of Harl Asktedt.)

Cross-examination by Mr. CAMPBELL.

Q. I understood you to say, Mr. Asktedt, that you didn't hear any whistles after your first whistle?

A. No, sir.

Q. And then you immediately blew a second one whistle? A. Yes, sir.

Q. Right after you blew your first one whistle?

A. After the second whistle was blowed, we received,—

Q. (Interrupting.) Yes, but I am speaking about the whistles that your vessel blowed. You blowed two whistles, didn't you? A. Yes, sir.

Q. At two different times? A. Yes, sir.

Q. Did you blow your second whistle immediately after your first whistle, right after the first whistle?

A. Yes, sir.

Q. And after the second whistle was blown, you received some whistles from the "Kern"?

A. Yes, sir.

Q. And you could not tell whether it was two two whistles, or four whistles? A. No, sir.

Q. That was because they came so close together?

A. Yes, sir.

Q. Now, at the time that you heard the four whistles from the "Kern," you were right close onto the "Kern," weren't you? A. Yes, sir.

Q. So close onto the "Kern" that your vessel didn't have much time to swing in obedience to her helm and to the reversing of the engine, did she?

[391]

A. Well, I can't say exactly the distance. I was

(Testimony of Harl Asktedt.)

occupied to the wheel that time; I had no time to judge any distance.

Q. Well, you struck the "Kern" almost immediately after you got your wheel hard over to the starboard, didn't you? A. Yes, sir.

Q. You remember testifying to that before the Inspectors?

Mr. DENMAN.—He says it is a fact.

Q. Well, that was the fact, that you struck the "Kern" almost immediately after you got your helm hard over to starboard?

A. I don't remember that now exactly. You know it is a long time ago.

Q. Well, your vessel hadn't swung very much when it struck the "Kern," had it?

A. No; it didn't swing much, as far as I remember.

Q. What is that?

A. I could not see very much; a dark night, you know, and you standing in a wheel-house, you can't see if the ship is swinging.

Q. Your recollection about this was fresher when you were before the Inspectors, wasn't it? You remembered more about it?

A. Yes. Of course, I remembered more about the things at that time.

Mr. DENMAN.—He could not see any better then, Mr. Campbell.

Mr. CAMPBELL.—Beg pardon?

Mr. DENMAN.—He could not see any better.

Mr. CAMPBELL.—I don't know; he may be color blind now and not then.

(Testimony of Harl Asktedt.)

Q. You remember this question: "How far were you away, do you estimate, from the 'Kern' at the time the wheel was pushed [392] hard astarboard? A. Well, I don't know how far; it can't be,—it wasn't far off then; I can't say what the distance might be. No, I can't say no distance. I was busy getting my helm hard over, and after I got it hard over, after that I struck the vessel." Was that right?

A. Yes, sir.

Mr. FULTON.—Well, he doesn't say right after.

Q. Did you strike the vessel right after you got your helm over?

Mr. DENMAN.—What do you mean by right after?

Mr. WOOD.—Soon after?

The WITNESS.—Soon after, right after is supposed to mean.

Q. (Mr. CAMPBELL, Resuming.) Well, was it a very long time, or a short time?

A. It can't be a very long time after. If it had been a long time, we would go clear.

Q. So it was a short time. Do you remember testifying to the questions: "Q. Did she swing or didn't she swing? A. She swung over. Q. She did? A. Yes, sir. Q. She didn't have time to swing much, though, did she? A. Very little. She was stopped, I suppose." Do you remember testifying to that?

A. Yes, I remember some of it.

Q. Well, by that did you mean that her bow didn't

(Testimony of Harl Asktedt.)

go very much to port before she struck?

A. Well, something like that.

Q. You said you heard Captain Patterson giving an order, "Stop and reverse"; how much time was there between the time he stopped and the time he gave the order to reverse? [393]

A. The command was, "Stop her and full speed astern."

Redirect Examination by Mr. DENMAN.

Q. All at once? A. Yes, sir.

Q. Now, as I understand it, you had the "Kern" half a point on your port bow? A. Yes, sir.

Q. You were steering the vessel, weren't you?

A. Yes, sir.

Q. And you crossed over that half-point when you swung, under a reversing propeller? A. Yes, sir.

Q. And struck her? A. Yes, sir.

Q. Now, could it have been a minute or two minutes or three minutes between the time you reversed and the time you crossed over that half-point and struck her?

Mr. CAMPBELL.—I think he ought to ask the witness what time elapsed, not suggest to him any minutes at all.

Mr. DENMAN.—Well, I said one, two or three; it could not have been over that. Now, what was it?

Mr. CAMPBELL.—Suppose it was half a minute, you are suggesting,—

The COURT.—(Interrupting.) Let him answer. Answer what length of time it was.

A. Well, I can't say any time, sir. At that time,

(Testimony of Harl Asktedt.)

the orders was given to me hard astarboard and I was too busy to get that helm hard astarboard, so I can't say no time.

Q. What is this cog apparatus that you speak of?

A. What is that, sir? [394]

Q. What is this cog apparatus that you speak of?

A. Well, this cog-wheel, this hand-steering gear, what we call cog-wheel, is a double drum, two drums.

Q. And you worked that, did you? A. Yes.

Q. That is the quickest way of putting it over, is it?

A. Yes, sir. We have a big brass handle on that wheel where we take the two hands and turn her right around.

Q. So you don't have to handle the spokes on the wheel? A. No.

Q. And that is for emergency use, is it?

A. Yes, sir.

Mr. WOOD.—I would like to have an explanation there. You say that that is the quickest way of putting the wheel over. You mean it is the quickest way that you had on the "Elder"; it is not as quick as steam-steering gear?

A. No, sir; it is the quickest way, I believe, for a hand-steering gear or cog-wheels. It has double drums, and the handle connected to the wheel.

Q. (Mr. DENMAN, Resuming.) Now, you said to the best of your recollection, you heard the first whistle somewhere around three-quarters of a mile away? A. Yes, sir.

Q. You are not definite as to the distance, but it

(Testimony of Harl Asktedt.)

was some distance off, around three-quarters of a mile? A. Yes, sir.

Q. And you heard your second whistle when you were about an eighth of a mile away? A. Yes.

Q. Or thereabouts? A. Yes, sir. [395]

Q. And do you know where this accident occurred on the river, what cannery you were opposite, or what place you were opposite there?

A. I remember I commenced at twelve o'clock, and I believe we passed that Cooper's Point, they call it.

Q. Cooper's Point? And where was the collision; how far below the Point?

A. Well, I can't say how far below the point it was. I came on deck at twelve o'clock and this occurred about after one bell. I can't say exactly the time now; I can't remember, after one bell.

Mr. CAMPBELL.—One bell would be,—

A. (Interrupting.) Half-past twelve.

Mr. DENMAN.—I guess that is all.

Mr. CAMPBELL.—Were you steering by compass or steering on the ranges?

A. I was steering by compass.

Mr. CAMPBELL.—The pilot gave you the course?

A. The pilot gave me the course.

Q. And your attention was directed to watching the compass? A. Yes, sir.

Witness excused. [396].

Testimony of Louis Olson, for Respondent.

LOUIS OLSON was next called as a witness on behalf of the respondent, and having been first duly sworn, testified as follows.

Direct Examination by Mr. DENMAN.

Q. Louis, what was your position, on the "Elder" that night? A. On the lookout.

Q. On the lookout, were you?

A. On the lookout; yes, sir.

Q. You are a seaman? A. Yes, sir.

Q. How long have you been a seaman?

A. About fifteen years.

Q. And deep sea vessels? A. Yes, sir.

Q. On steamers? A. Yes.

Q. And how long had you been on the "Elder"?

A. The last five years before.

Q. Five years; do you recollect seeing the "Kern" off Waterford Cannery as you came down that night?

A. Yes.

Q. Did you blow any whistles to her?

A. I blowed one whistle first.

Q. How far away were you when you blew that first whistle from her?

A. About three-quarters of a mile, I guess.

Q. Where was that with reference to the point, to Cooper's Point? A. To Cooper's Point?

Q. Do you know where Cooper's Point is?

A. No, I don't know where that is. [397]

Q. Do you remember passing around the point before you came there? A. Yes, I remember that.

(Testimony of Louis Olson.)

Q. How far was that point from the place of the collision, do you know?

A. Oh, it was about a thousand feet, I guess.

Q. No, no; this point; how far was this point that you rounded from the place of the collision?

A. I don't remember that.

Q. But you say you gave your first whistle about three-quarters of a mile off? A. Yes.

Q. What did you do then?

A. Well, they blowed another whistle.

Q. What course were you on? Where was the "Kern" then with reference to your bow?

A. He was about a point on the port bow.

Q. About a point on the port bow. How far were you from the "Kern" when the second whistle was blown? A. About a thousand feet, I guess.

Q. What happened then? Did you get any whistles from anywhere else?

A. The first they blowed one whistle. Then they blowed one more,—they didn't answer the first whistle; then they blowed one more and then they answered with two.

Q. I say what happened then?

A. Then she struck.

Q. What did your vessel do before she struck?

A. Stopped. We struck her.

Q. Stopped her? A. Yes. [398]

Q. Did you feel the reverse of the propeller?

A. I could feel them stopping her and then full speed back.

Q. You say she was half a point on your port bow?

(Testimony of Louis Olson.)

A. Yes.

Q. Did you cross over and finally hit her?

A. Yes, sir.

Cross-examination by Mr. CAMPBELL.

Q. Have you been talking this over with the other members of the crew? A. No.

Q. You haven't? A. No, sir.

Q. Did you report the "Kern" to the bridge?

A. Yes.

Q. Where was that, three-quarters of a mile away?

A. Yes.

Q. You knew it was a steamer down there?

A. Well, I saw some river boats passing around there on the other side away over.

Q. Did you see this boat ahead?

A. Yes; I see the lights all right.

Q. You saw the lights all right? A. Yes.

Q. Now, you knew that she was going to strike the "Kern"? You knew that your vessel was going to strike the "Kern" when your engines were put full speed astern, didn't you?

A. Yes, I knew they were going to strike then.
[399]

Q. You were so close to her? A. Yes.

Redirect Examination by Mr. DENMAN.

Q. When you said you hadn't talked that over, you were referring to talking out in the hall, weren't you? A. In the hall?

Q. Yes; you didn't talk it over with the other members of the crew in the hall here? A. No.

(Testimony of Louis Olson.)

Q. You recollect being in Senator Fulton's office the other night and talking it over with all of us, didn't you, last Tuesday night? A. Oh, yes.

Q. With all of us there? A. Yes.

(Witness excused.) [400]

Testimony of Claud Smith, for Respondent.

CLAUD SMITH was next called as a witness on behalf of the respondent, and having been first duly sworn, testified as follows:

Direct Examination by Mr. DENMAN.

Q. Mr. Smith, what position did you hold on the "Elder" on the night of the collision?

A. First officer.

Q. And where were you at the time of the collision?

A. In my bunk.

Q. In your bunk. Did you come out immediately afterward?

A. Why, I came out just shortly before the collision occurred.

Q. Shortly before the collision occurred?

A. At the time the engines reversed, that is what woke me up.

Q. When the engines reversed? A. Yes, sir.

Q. What did you do then?

A. Turned out, got into the first clothes that were handy and went on deck to see what was doing.

Q. Had she struck before you got out on deck?

A. Struck before I got out on deck; yes, sir.

Q. Was she still in the hole when you got there?

A. Well, I don't know about that. I believe she

(Testimony of Claud Smith.)

was backing away when I appeared on deck, as near as I can remember, sir.

Q. Any whistles?

A. I heard four whistles from the "Kern" after I came on deck.

Q. Where did you take the "Elder" to, then?

A. Well, we just backed up and stopped her. I don't know just what the maneuvers were on deck at that time; I was [401] getting a boat over.

Q. I see. Now, what can you say about the "Elder's" steering capacity; is she quick or slow?

A. Ordinarily she is a quick-steering vessel.

Q. When you say ordinarily, was she on that night?

A. Yes; that is, I mean in still water, going at normal speed, she is a good-steering vessel.

Q. Suppose you were five hundred feet astern of a vessel straight astern and you wanted to pass her to starboard and the way was clear to her starboard, would you have any difficulty when you were going at that speed?

Mr. CAMPBELL.—Just a moment. If the Court please, this witness has not been qualified as an expert navigator.

Mr. DENMAN.—Oh.

Q. What was your position on the "Elder" on that night? A. First officer.

Q. How long had you been? What papers do you hold?

A. First officer, unlimited to any ocean.

Q. How long had you held them?

A. Now, as to that I can't say. My license was

(Testimony of Claud Smith.)

made out, I think, in 1906.

Q. And what had you held before that?

A. Second mate, any ocean.

Q. How long had you held that?

A. Well, I had held that perhaps three or four years. That was issued in 1904, as I remember it.

Q. 1904. How long had you been at sea altogether?

A. Well, it is pretty hard to reduce that down to years.

Q. I mean in round figures.

A. Approximately I suppose I had been to sea about eleven or [402] twelve years at that time.

Q. As seaman but afterwards as mate?

A. Afterwards as mate; yes, sir.

Q. And you are now first mate, are you?

A. I now hold first mate's license for steam and master for sail, unlimited any ocean.

Q. Well, let me ask you now, you know how the "Elder" handles, don't you?

A. I have a pretty fair idea, yes.

Q. How long have you handled her?

A. Well, I was in the ship altogether about three years.

Q. Now, suppose you were five hundred feet dead behind the "Kern," pointing straight on her, and she was pointing straight away from you, and there was clear water on her starboard side, would you have any difficulty going at the speed, going at full speed, in clearing her to starboard?

A. I should say we would not. That is, I think we would not. I am willing to swear that we would clear

(Testimony of Claud Smith.)

her without any difficulty by a margin of a hundred and fifty feet, or thereabouts.

Q. And supposing you were a thousand feet astern of her and blew one whistle and got an answer back one whistle, could you clear her under those circumstances? A. Why, most assuredly.

Q. How far would you clear her if you wanted to go as far as you could in that thousand feet?

A. Probably a couple of ship's lengths.

Q. A couple of ship's lengths? A. Yes.

Q. In other words, you would be getting pretty well off— [403]

A. (Interrupting.) By the time she got abreast of the other vessel she would be an angle of forty-five degrees of her and still leaving her.

Q. So if you were on the "Kern" looking back and a thousand feet directly astern of you saw the "Elder" and she blew a one-whistle signal to you indicating she was going to the starboard, would you think there was any risk of collision?

A. I should not; no, sir.

Q. Suppose she was five hundred feet and blew a whistle indicating she was going astarboard, would you think there was any risk of collision?

A. I should not.

Cross-examination by Mr. CAMPBELL.

Q. If you were in command of a steamer like the "Kern," with passengers on board of her, and you saw a steamer, an ocean steamer, coming down showing all three lights heading for you and she got within five hundred feet before she gave a passing signal,

(Testimony of Claud Smith.)

you would not think there was any danger of collision?

A. Under the circumstances on this river I should think nothing out of the ordinary, not greatly out of the ordinary, five hundred feet, even; though that would be close; I will admit that would be close.

Q. Is that the practice on the river?

A. On the river here if you will make a trip up and down at any time you will find that vessels get in very close quarters to one another, and very seldom have any trouble.

Q. Is that the practice on the river, to run within five hundred feet before they shift their courses?
[404]

A. Well, not ordinarily, but we should not—

Q. (Interrupting.) Is that the practice of the pilots on the—

Mr. FULTON.—(Interrupting.) Wait until he gets his answer finished.

A. Not ordinarily; it is not the practice to get within five hundred feet, though I will say it occurs occasionally. The pilots on the river here are very careful.

Q. Is it the practice of Captain Patterson to run that close?

A. It is not, if he could have avoided it.

Q. You could have avoided it in this case?

A. Now, you are getting back where I don't know anything about it. As I said before, at the time of the collision I was probably getting into my clothes, having been waked up—I was sound asleep—by the

(Testimony of Claud Smith.)

reversing of the engines.

Q. So that it is your judgment—you are the kind of a navigator that would think there was no danger of a collision if you had a vessel five hundred feet astern of you—

Mr. DENMAN.—(Interrupting.) And one whistle was blown?

Mr. CAMPBELL.—What difference whether one whistle was blown or not?

A. I should think there was a reasonable chance of clearance, though as I said before it would be a little too close for comfort.

Q. It would worry you a little bit if you were on the overtaken vessel, wouldn't it? A. Sir?

Q. It would worry you a little bit if you were on the overtaken vessel?

A. Well, I should probably wonder what they were doing [405] back there at that time.

Q. Now, as I understand it, you were awakened by the vibration of the engine reversing?

A. Correctly.

Q. And that is the first intimation that you had that a collision was imminent? A. Yes, sir.

Q. And you were in bed at the time?

A. Asleep; yes, sir.

Q. And you usually retire in your underclothing, do you?

A. Well, I don't usually wear underclothing.

Q. Well, when you dressed what did you do, put on your trousers and your coat?

A. I just slipped into the handiest rags that were

(Testimony of Claud Smith.)

handy. I don't just remember what they were, something handy for getting out on deck in a hurry.

Q. That took you about five or ten seconds to get into them?

A. I would not put it into seconds; probably a little longer than that.

Q. Pretty quick, wasn't it?

A. It was quick anyway.

Q. And before you got out on deck the collision had taken place?

A. The collision had occurred, yes, sir.

Q. You said you heard four whistles from the "Kern" after you came out on deck?

A. After I came on deck I heard four whistles, yes, sir.

Q. That was the alarm signal calling for help after the collision occurred?

A. Probably was, sir. [406]

Mr. DENMAN.—Could the "Elder" have run a thousand feet or so between the time you waked up and the time you got out on deck?

A. Well, that would have been probably less than a minute. I believe she could.

Mr. DENMAN.—When you got out on deck from the speed that you felt she was going you think she would run that distance in that time?

A. Well, now, from the time that the engines reversed she was working under diminishing speed. Her speed was diminishing; her way was diminishing all the time, because her engines were working the other way.

(Witness excused.)

Mr. DENMAN.—We have one other witness in the morning, your Honor, but it will only take a few minutes.

The COURT.—One other witness on your side; and you have two witnesses on your side, Mr. Campbell?

Mr. CAMPBELL.—Yes; and then we will probably call one or two in rebuttal, but they will be very short.

Thereupon court was adjourned until to-morrow morning, Thursday, February 8th, 1912, 10 o'clock A. M. [407]

Thursday, February 8, 1912, 10:00 A. M.

Testimony of Daniel Kern, for Claimant (Recalled).

DANIEL KERN, recalled by the claimant.

Direct Examination.

Questions by Mr. DENMAN:

Mr. Kern, do you recollect requesting pilots to slow down their larger steamships passing your barges? A. Yes, sir.

Q. That is on account of the wash from the steamers?

A. Breaks their lines and disorganizes the tow.

Cross-examination.

Questions by Mr. CAMPBELL:

Have they done so, Mr. Kern?

A. I don't know of them doing it in very many cases. The steamer "Hassalo" is about the only one I have ever seen when I have been traveling up and down the river that did it.

(Testimony of Daniel Kern.)

Q. What was your reason for making the request, Mr. Kern?

A. They will break up our lines and the barges go adrift and water washes over the barges.

Q. How were the pilots in the habit of doing?

A. I never noticed them slow down. Of course, I don't travel up and down a great deal—have made a great many trips, but I never noticed them slow down.

Q. How did you come to make a request of that sort?

A. We had so much trouble with our tows by breaking up, lines breaking, break the guards of our steamers or those barges.

COURT.—That would be the water—

A. That would be the water, the steamer's disturbing the water and making waves.

Witness excused. [408]

Testimony of Edward Anderson, for Libelant.

EDWARD ANDERSON, a witness called on behalf of the libelant (out of order by consent of counsel), being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. WOOD:

Mr. Anderson, what is your present position?

A. Chief officer of the "Elmore."

Q. How long have you been a sea-faring or boating man? A. About twenty years.

Q. Have you been a deep-sea sailor?

A. All my life.

(Testimony of Edward Anderson.)

Q. How long have you been on the Columbia River? A. About five years off and on.

Q. Were you on the "Daniel Kern" on August 18th, the night of this collision with the "Elder"?

A. I was.

Q. What was your capacity then?

A. Chief officer.

Q. About what time of day or night did this collision occur? A. About midnight.

Q. What was the "Kern" doing just prior to the collision? A. Making up a tow.

Q. Tow of what? A. Barges.

Q. Loaded or light? A. Loaded barges.

Q. Loaded with what? A. Loaded with rock.

Q. For what place were they taking the rock?

A. For the Government at Fort Stevens for the jetty.

Q. Were they large or small stones for that purpose? A. Oh, twenty-five or fifteen tons. [409]

Q. What would you say was the load of each barge in weight? A. A tow amounts to about 2,700 tons.

Q. About what is the good deep-ship water at that point across the Columbia River?

A. I don't understand the question.

Q. About how wide is what you might call the channel or good going water for deep ships at that point? A. A mile.

Q. About how far off the Washington shore were the "Kern" and barges?

A. Nine hundred or a thousand feet.

Q. And were the barges at anchor or drifting?

(Testimony of Edward Anderson.)

A. Drifting.

Q. What was the position of the "Kern" immediately prior to the collision in reference to the thread of the stream and the Washington shore?

A. Well, we were heading very near down river, a little towards the Washington shore.

Q. Where were you yourself prior to the collision?

A. On the forecastle-head.

Q. Where? A. On the forecastle-head.

Q. Of the "Kern"? A. Yes, sir.

Q. And what were you doing?

A. Getting a line out to make the tow.

Q. What line was it on the "Kern"?

A. Putting out the line on one of the barges—a head-line on one of the barges.

Q. Port or starboard head-line? A. Port-line.

Q. On what barge were you putting it?

A. On the outside barge. [410]

Q. About how was the "Kern" at this time lying in reference to the barges?

A. Why, the barges was lying—as the barges were turned she was lying very near across their stern.

Q. Take those models there, those being the barges and this being the "Kern," and just give a rough illustration of their relative position.

Mr. WOOD.—If no objection by counsel I will interpret that into the record. The port bow of the "Kern" was then against—

A. I put it right on this barge.

Mr. WOOD.—The port bow of the "Kern" was then laying against the stern of the starboard bow.

(Testimony of Edward Anderson.)

A. May not have been the stern; may have been there; may have been like that, but that was about the position the vessel was lying.

Q. Close to the stern? A. Yes, sir.

Q. And swinging off from the stern of the port barge? A. How is that?

Q. And further away, that is, angling?

Mr. DENMAN.—I object to leading the witness.

Mr. WOOD.—I am trying to interpret this position. All right.

Q. Then state the relation of the “Kern” to the stern of the port barge; was she as close to that as she was to the stern of the starboard barge?

A. No, sir. Closer to the starboard barge than she was to the port barge, but she was very close, not very far off.

Q. Have you said which barge you were giving the line on? A. Port barge. [411]

Q. What part of the port barge?

A. The port bitt.

Q. What was the purpose of this so far as the “Kern” was concerned?

A. Why, taking a line there to turn around so as to bring our bow around and work her in here so as to make up the tow.

Q. Had this line been made fast and tightened?

A. Just about.

Q. And was there any other line out?

A. That was all.

Q. Was the tow under control or were you in position to control it? A. No, sir.

(Testimony of Edward Anderson.)

Q. Now, while you were engaged in this work did you see the "Elder" approaching? A. I did.

Q. You have said that you were on the forecastle-head? A. Yes, sir.

Q. Were you there—were you at any other part of the ship just prior to the collision?

A. Not just as it occurred.

Q. So you remained on the forecastle-head all the time? A. Yes, sir.

Q. Did that give you a view up the river toward Cooper's Point? A. Yes, sir.

Q. And you have already said, I think, that you saw the "Elder" approaching? A. Yes, sir.

Q. How was she coming in reference to the "Kern" and in reference to what lights you saw on the "Elder"?

A. I seen all her lights—masthead and both side-lights.

Q. Just name them?

A. Masthead light and both sidelights.

Q. What is known as the sidelights and the running light? [412] A. Yes, sir.

Q. And what did that indicate to you as a navigator as to her line of approach on the "Kern"?

A. Coming head on.

Q. How far away was she in your judgment—the "Elder"—when you first saw her?

A. When I first saw her?

Q. Yes.

A. Well, I didn't know it was the "Elder"; I seen

(Testimony of Edward Anderson.)

a steamer up at Oak Point above a couple of miles, three or four miles.

Q. How far is Oak Point above Cooper's Point?

A. Three miles.

Q. From where the "Kern" was lying at that time and at the time of the collision, can you see beyond Cooper's Point unobstructedly up the river?

A. Yes, sir.

Q. Now, you saw a steamer up the river about two miles? A. Three miles.

Q. Three miles. Did any other steamers pass you? A. No, sir.

Q. When did you next see this steamer?

A. Noticed her again at Cooper's Point when she blew the whistle.

Q. And was she above Cooper's Point or down toward you when she blew that whistle?

A. She had rounded Cooper's Point.

Q. What?

A. She had rounded—she had shifted her course from Cooper's Point.

Q. I wanted to know was that below Cooper's Point, towards you, or above it?

A. At Cooper's Point. [413]

Q. At. And about how far away from the "Kern" would you estimate that to be? When she blew the first whistle?

A. Oh, about a quarter of a mile below her.

Q. What did the "Kern" do in answer to this—these whistles, rather, were they blown for the "Kern"? A. Yes, sir.

(Testimony of Edward Anderson.)

Q. And did the "Kern" answer?

A. Answered with four.

Q. And how soon after the "Elder"—this ship turned out to be the "Elder," did it?

A. Yes, sir.

Q. How soon after the "Elder" blew her one whistle did the "Kern" answer with four?

A. Immediately.

Q. What was the next signal that was exchanged between these vessels?

A. The "Elder" blew one more whistle and the "Kern" blew four more.

Q. And what interval of time elapsed between the "Elder's" blowing her one whistle and the "Kern"—that is, the "Elder" blowing her second whistle and the "Kern" blowing her second four whistles? What interval of time was between them?

A. Very short.

Q. And how soon after the "Kern" blew her second four did the collision occur, in your judgment? A. Very short time.

Q. Can you make an estimate in seconds?

A. Might have been a minute—a minute or so.

Q. What did you do when the "Elder" blew the first whistle or the passing whistle? One whistle is the starboard passing whistle? [414]

A. One whistle is porting your helm.

Q. What is that?

A. One whistle is porting your helm; that is the intention.

Q. It is the whistle to pass to the starboard of the

(Testimony of Edward Anderson.)

“Kern,” isn’t it—one whistle?

A. Yes, starboard of the “Kern.”

Q. Starboard of the “Kern.” Now, what did you yourself do when that first whistle was blown?

A. When the first whistle was blown?

Q. Yes, by the “Elder.”

A. I was getting a line out at that time on the barge when the first whistle was blown.

Q. And you were busy at that? A. Yes, sir.

Q. Did you still continue to observe the “Elder” at all? Look out to see how she was coming?

A. Yes, sir, I did.

Q. Were those same lights still visible?

A. They were.

Q. Were you yourself working at the forecandle-head or were you directing other men?

A. Directing the sailors.

Q. And did you look at all from time to time—keep your eye on the “Elder”?

A. I seen her, yes, sir.

Q. Now, did these bearings in relation to the “Kern” or did the lights as showing the bearing of the “Elder” change from the time that you first saw them head on towards you?

A. The bearing hadn’t changed.

Q. After the “Elder” blew her second one whistle what did you do then?

A. Sung out, “Let go the line.” [415]

Q. Why did you want to let the line go?

A. To try to get clear, seen there was going to be a collision.

(Testimony of Edward Anderson.)

Q. And was the line let go?

A. It was partly gone.

Q. At the time that you sang out to let go the line did you sing out sharply and indicate haste in any way?

Mr. DENMAN.—Please don't lead the witness.

Mr. WOOD.—I beg your pardon.

Q. Well, you may state just the facts at that particular time.

A. Well, the "Elder's" whistle just—when they blew the last whistle I seen there was going to be a collision and the pilot he run in to hook her on and I let go the line, put on full speed for the beach and about that time the collision occurred. That is all there is to it.

Q. Was your line fully let go at the time of the collision? A. Well, it went overboard.

Q. What signal was given on the "Kern" at about this time in relation to her engines turning over?

A. Full speed ahead.

Q. Did you hear that signal? A. I did.

Q. How long before the collision?

A. A couple of seconds.

Q. Did the "Kern" get any headway?

A. I don't think so; didn't pick up much.

Q. Do you know whether the propeller of the "Kern" was working at the time of the collision?

A. Well, I suppose it must have been working at the time of the collision.

Q. You don't know that from observation; you just suppose so [416] because the signal was

(Testimony of Edward Anderson.)

given? A. Yes, that is all.

Q. Now, where was it that the "Elder" struck the "Kern," and to the best of your knowledge at what angle with the fore and aft line of the "Kern"?

A. About a forty-five degree angle.

Q. And that forty-five degree angle bearing forward or aft?

A. Well, from aft—from aft forward.

Q. And at about what point in the hull of the "Kern"?

A. Well, just abaft of my room; I guess about twenty or twenty-five feet from the stern—twenty feet; something like that.

Q. How far did the "Elder" go into the "Kern," do you know? A. Right into her keelson.

Q. Now, then, what change in position as to the "Kern" and the barges was caused by the collision? How did the collision place the "Kern" in relation to the barges?

A. Right athwartships in the river, right across the river.

Q. Well, in relation to the barges themselves?

A. The barges went downstream.

Q. How did it lay her in relation to the barges?

A. I don't understand your question.

Q. Just before the collision she was lying in the relation to the barges that you have placed these models, with the nose of the "Kern" somewhat near to the stern of the starboard barge. Now, when she was hit how did that place the "Kern" in position with reference to the barges?

(Testimony of Edward Anderson.)

A. She lay here and the barge went through this side and broke the three barges adrift and they went down at random; this barge went through this side.

Q. Which barge when you say this barge?

A. The port barge. [417]

Q. And which corner of the— A. Port corner.

Q. And which side of the “Kern”?

A. On the port side of the “Kern.”

Q. Then after the collision you may state what you did.

A. I went on the bridge and jumped down aft and looked at the hole and seen she was sinking; went to the engine-room; seen the first assistant and said she was sinking; said go on the barge; and I went forward and I ordered my crew on the barge, and then proceeded to go and get off myself.

Q. What did you do yourself?

A. I got off as soon as I could. I got on to the “Hercules.”

Q. How did you get to the “Hercules”?

A. Got hold of a line and was hauled up out of the water.

Q. What width of channel for the “Elder” to pass was there on the port side of the “Kern” and the barges?

A. Oh, there was a quarter of a mile there. On the port side of the barge did you say?

Q. On the port side of the “Kern” and the barges, yes, as they were then lying. The port side, the Oregon side of the river.

A. About a quarter of a mile.

(Testimony of Edward Anderson.)

Q. About what are the lengths of these barges?

A. The length of them?

Q. Yes.

A. One hundred and eighty feet, I think—one hundred and sixty or eighty.

Q. About what is the length of the “Kern”?

A. About a hundred and fifty feet.

Q. And about what is the width of the barges?

A. Forty feet. [418]

Q. Was there any current in the river at the time of the collision?

A. At that time of the year there is always more or less down current.

Q. Well, I want a definite answer in these matters: Was there a current? A. Yes.

Q. Were the barges drifting, moving with the current? A. They were.

Cross-examination.

Questions by Mr. DENMAN:

Let me see, are you a pilot? Were you a pilot on the river at that time?

A. I was mate.

Q. And your business as mate was to make up these tows, wasn't it?

A. Yes, sir, put the lines out—have them put out.

Q. And your practice is—I think it was stated here your practice was to have the three barges lashed together and then the tug goes down and the vessel works in between them and takes them on down the stream. That is correct, isn't it?

A. They come down put together; we receive them

(Testimony of Edward Anderson.)

that way; we try to get in between them.

Q. So they were all solidly put together at the time you received them? A. Yes, sir.

Q. And you simply go in between them, that is correct, is it? A. Yes, sir.

Q. Now, then, suppose the captain of the "Elder" testified—

Mr. WOOD.—Do you mean the captain of the "Elder"?

Q. One moment. I mean the captain just as I said. Suppose [419] the captain of the "Elder" had testified that this was the position of the "Kern" and the three barges. Is that correct? A. No.

Q. Could anybody honestly say that that was the relative position? A. What is that?

Q. Could anybody honestly say that this was the position of the "Kern" and three barges at the time the four-whistle signal was given?

A. Could anybody honestly say if that was the position?

Q. Yes. A. They might, yes.

Q. Was it the position?

A. I don't think it was.

Q. Well, what was the position?

A. I had a position here as near as I can remember. This way I said it was.

Q. That is the way you said it was. Now, I will give you this exhibit. (Libellant's Exhibit 6.) Wasn't that the real position of the "Daniel Kern" at that time? A. Sir?

Q. Isn't that the real position of the "Kern" at

(Testimony of Edward Anderson.)

that time? A. This is the position I said it was.

Q. I asked if that was not the real position.

A. I said the position was here.

Q. Now, wasn't this the real position? A. No.

Q. Weren't you mistaken? A. No.

Q. Now, could anybody looking at that, at that time, have honestly said that that was the position of the two—[420] the barge and the tow? Could they? Could anybody who saw?

A. What is that question?

Q. Could anybody who saw what happened there have said that was the relative position of the two?

A. Yes—so close—they could have; yes.

Q. Now, if you were in this position, your port bow about fifteen feet abaft the stem would be against the starboard corner of the port barge, wouldn't it? That is the way it is described here in this drawing? A. What did you say?

Q. The port bow of the "Daniel Kern" was touching the port barge on her starboard aft corner about fifteen feet abaft the stem of the "Kern"?

A. By that position?

Q. Yes.

A. That is what the position shows; yes.

Q. But you say that instead of that the port bow of the "Daniel Kern" was abaft—was touching—

A. Said it was up here; didn't say it was touching—said it was about here some place.

Q. Then this might have been the position of the two; you might have been mistaken in your statement? A. I don't think so.

(Testimony of Edward Anderson.)

Q. You have a pretty keen recollection of that?

A. Fair.

Q. Pretty good memory? A. Yes.

Q. Now, let me ask you: After the "Kern" was struck how did she lie with reference—just show here. After the "Kern" was struck how did she lie with reference to these barges? What happened? Which way did they swing around? [421]

A. Well, when she was struck—

Q. You said she was there in that position.

A. I said she was in this position.

Q. When she was struck?

A. Yes, this is the way I had them. When she was struck she hit this corner—went through the port side of the "Kern," broke the tow up. After that I don't know; the barges went down the river.

Q. As a matter of fact didn't they lie right alongside like that immediately after struck?

A. I don't remember.

Q. You were there?

A. I ordered the men on the barges and I went below. They might have been there. I know this barge went alongside here and stove in the port side.

Q. Your opinion is that she hadn't—the "Daniel Kern" didn't go forward enough to alter her position in the water before she was struck. That is correct, isn't it? A. I think it is.

Q. Now, what was the condition of the tide at that time? A. I don't remember.

Q. Do you remember whether it was full or slack or— A. I don't know.

(Testimony of Edward Anderson.)

Q. Well, suppose all the other witnesses have testified that it was slack water and there was no current, would you want to contradict them?

A. Yes, I say there was a current.

Q. You say there was a current? A. Yes.

Q. Although every other witness in the case has said there wasn't? A. I don't care.

Q. How far apart were the vessels when you first blew four whistles? [422]

A. How far apart were they?

Q. Yes, in feet.

A. When the first whistles were exchanged?

Q. Yes.

A. Oh, a quarter of a mile—a little more, maybe—something like that.

Q. Might have been a little under?

A. I don't think so—about a quarter of a mile.

Q. Suppose Captain Moran testified just about a thousand feet or a little less; would you want to contradict him on that?

A. I said about a quarter of a mile.

Q. I say would you want to contradict him on that? A. Yes, I say a quarter of a mile.

Q. He was higher up than you, wasn't he?

A. Not a great deal.

Q. And the bridge was between you and the other ship, wasn't it?

A. Oh, you mean the captain of the—

Q. Of the "Kern."

A. I don't understand that question.

Q. Suppose Captain Moran had testified, standing

(Testimony of Edward Anderson.)

on the bridge, that the "Elder" was only a thousand feet off when he blew his first signal, would you want to contradict it? A. I said a quarter of a mile.

Q. I say, knowing he was in that position would you want to contradict him? He would be in a better position to determine the distance apart?

A. I would have the same chance to determine as he would. That height wouldn't make any difference, the short distance.

Q. As I understand, the "Elder" was right behind you at that time. [423] A. Right behind us?

Q. Yes. A. No, sir.

Q. She wasn't? A. No, sir.

Q. Then if the captain had said that he saw her coming from directly astern—would have struck him right amidships the stern if he had gone on, he is mistaken?

A. I have nothing to do with the captain.

Q. I guess you are right about that. But you are certain when you first saw her—when the first whistle was blown she was not directly behind and was not running directly for you amidship?

A. She was not dead astern of us; no, sir.

Q. And was not running for amidship astern of you? A. Amidships astern?

Q. Yes, the middle of your—

A. You mean stern post?

Q. Yes. A. No, not quite the stern post.

Q. And would not, if gone straight on her course, split you right up the middle from stern to bow? She would not have done that?

(Testimony of Edward Anderson.)

A. If she went on our course?

Q. If she had kept on the course that you saw her on when the first four whistles were blown she would not have gone through your stern and split you right up the middle to the bow? A. She didn't.

Q. I ask you if she had kept straight ahead when you first saw her if she wouldn't have struck your stern post and gone straight [424] down the middle and split you right through if she had been a razor?

Q. She never hit her stern post?

Mr. DENMAN.—Please read the question.

(Question read.)

A. No.

Q. In other words, she was going to your side when she blew the four-whistle signal?

A. On our quarter.

Q. And your theory of the case is then—well, suppose, now, the vessel is coming down and she is directly astern of you and a quarter of a mile off and you are running downstream and there is eight hundred feet of water between you and the Washington shore; now, this vessel is coming downstream and she is a quarter of a mile off and she blows one whistle and there is abundant room for her to pass on the starboard side, have you got a right to hold her up if there is nothing to obstruct her on the starboard side?

A. I have if I don't deem it safe to pass in my own judgment.

Q. If there is clear water on that side it is safe for

(Testimony of Edward Anderson.)

her to pass, isn't it? A. I may not deem it so.

Q. But you would deem it so if it were clear water, wouldn't you? A. I don't know.

Q. Why don't you know?

A. Ask me that question again.

Q. You would deem it safe to pass on your starboard side if there were eight hundred feet of clear water and a vessel was signalling for permission to go there when she was a quarter of a mile away? [425]

A. What is the position of the ship I am in?

Q. You are lying dead in the water and eight hundred feet of clear water between you and shore; in other words, you don't have to move to clear. There is plenty of clearance without you assisting; you are lying dead in the water about eight hundred feet clear way between you and the shore and a vessel is a quarter of a mile away and asks permission to pass in that eight hundred feet. Would you consider it was safe for her to try to do so? A. Yes, I would.

Q. And he would be entitled to get permission under those circumstances? A. Yes.

Q. The answer is yes? A. Yes, sir.

Q. Do you remember testifying before the United States Inspectors in this case that if the "Elder"—when she blew the one-whistle signal to which you responded with four whistles that she then had abundant time to clear you to starboard if she had gone through?

A. Do I remember testifying what?

Q. That when the one-whistle blast was blown to

(Testimony of Edward Anderson.)

which you replied with four whistles— A. Yes.

Q. —that there was abundant time in that quarter of a mile for the “Elder” to have passed to your starboard? A. I don’t remember testifying that.

Q. Well, you just stated that there was time.

A. That is all right, I know I did now, but I don’t remember testifying that to the Inspectors; you said I testified that to the Inspectors. [426]

Q. You didn’t testify that to the Inspectors?

A. No, I don’t think so. I don’t remember if I did.

Q. Well, we will presume you didn’t. Now, when a man comes up from the stern and is the pursuing vessel and wanting to pass you—you are ahead—when he blows his one whistle should he commence his maneuver at once or wait for your reply?

A. Wait for a response.

Q. Wait for his response. In other words, if it required him at that time to port his helm or starboard his helm, as the case may be, your idea is that he should blow one whistle, then wait for permission, and if he gets it, then commence his maneuver to pass you. That is correct, is it?

A. It ain’t my idea; that is the law.

Q. That is the law. I am glad to know you have one witness on your side that knows it.

Mr. FULTON.—He should be associated at once with counsel.

Mr. CAMPBELL.—Counsel for the respondent.

Mr. FULTON.—Well, I will withdraw that remark.

(Testimony of Edward Anderson.)

Q. By the way, would you be able to testify whether or not the three barges were pointing upstream just after the collision?

A. No, I could not testify that.

Q. Now, as a matter of fact, it is three years—three or four years since that occurred, isn't it?

A. Some time.

Q. And the details of it are not so very keen in your memory, are they?

A. Some of them are pretty keen.

Q. Those you talked over with counsel before you came here? A. Those are the ones.

Q. I thought so. Did you have a chance to read over this testimony? [427]

A. I read over all of it.

Q. When did you do that?

A. Oh, about two hours ago.

Q. Of course, I haven't had that advantage to talk it over with you. I think we will let that stand.

Redirect Examination.

Q. Mr. Anderson, when you say, answering as a skilled navigator, that with eight hundred feet of clearance in the river on the starboard of a vessel lying dead, and an approaching vessel fifteen hundred feet or a quarter of a mile away, that it was safe to go to the starboard, what condition did you assume the overtaken vessel or the one lying dead, to be in?

A. He just said a vessel lying still; that is all; a lone vessel lying still.

Q. What condition did you assume her to be in?

A. I don't understand your question.

(Testimony of Edward Anderson.)

Q. What condition as to ability to handle herself do you assume her to be in? A. Which vessel?

Q. The overtaken vessel lying still.

A. I can't get. I can't get what you are getting at; I can't understand you.

Q. I will try it another way, then. Come down to this particular case. Had you been in command of the "Kern," and the conditions being as you have described them, the barges lying adrift and loaded—

Mr. DENMAN.—They were fast.

Mr. WOOD.—Not fast to the ground.

Mr. DENMAN.—Oh, I beg your pardon. [428]

Q. The barges lying adrift in the river and loaded; the "Kern" just having approached them with only one line out, and the "Elder" coming, as you say, with all lights visible, a quarter of a mile away, and she had asked permission to pass, what signal would you have given from the "Kern"?

Mr. DENMAN.—I object to that as not being a theoretical question put to an expert. You were asking this case.

Mr. WOOD.—Well, I will ask this case theoretically, then.

Q. Suppose a case of three barges lying adrift in a river, loaded with stone—the barges loaded with stone—lying adrift in the river with, we will say, nearly a mile of channel and eight hundred feet of clearance way on the starboard side of the barges, and a towboat, just approaching those barges to take hold, and get in position, but not yet in position, with only one line out and that not made fast; and a deep

(Testimony of Edward Anderson.)

sea steamer approaching was fifteen hundred feet away, all of her lights coming head on toward the barges, and the tugboat—the approaching vessel blows one whistle to pass to starboard; under those circumstances, you being in command of the tugboat at the barges, what answer would you have given to that whistle? A. Four blasts.

Q. Why?

A. Because my vessel is not under control. And if I leave the barges I leave an obstruction for the other boat to hit.

Q. Now, when you answered the question of counsel that a vessel lying still in the water—that it would have been safe for the approaching steamer to pass to the starboard with eight hundred feet of clearance, what condition, I say, did you suppose the overtaken vessel to be in, in relation to handling herself?

A. I can't get that; I can't get that question through my head. [429]

Q. In other words, you told counsel, upon a suggestion made by him, upon certain facts and conditions, with the vessel lying still in the water and another approaching, with eight hundred feet of clearance it would be safe to go to starboard. Now, in the case I gave you, you said it wouldn't be safe, and you wouldn't permit it. What is the difference between those two cases?

A. The difference is this: He just gave me a lone vessel; he didn't give me a tow.

Q. Did you suppose that lone vessel he gave you to be in full capacity to handle herself?

(Testimony of Edward Anderson.)

A. She was lying still; he didn't say broken down.

Q. Suppose she was broken down, herself.

A. If broken down I would have blowed four whistles.

Recross-examination.

Q. Why?

A. Because the vessel is not under command.

Q. Now, suppose your vessel is lying dead in the water and there is plenty room to clear you to the starboard and you could not move; suppose you were anchored there, could you hold the other vessel upstream as long as you please?

A. I wouldn't have anything to do with the other vessel at all.

Q. Well, if you were lying dead in the water you wouldn't have anything to do with her anyway.

A. I have to let the other man know my boat is not under control—my vessel is not under control—under anchor.

Q. When there is abundant space to starboard?

A. Yes, if you give a signal and there is a collision, then your are responsible.

Q. What is that? [430]

A. That is, if you give a passing whistle and they pass and there is a collision, then the vessel you are in is responsible.

Q. Do I understand you to say, whenever you are making up tows in that position in the fairway, you can hold the other vessel until you can make up the tow? A. You can, sir.

Q. That is your understanding of the law?

(Testimony of Edward Anderson.)

A. That is the law.

Q. Who told you that? A. I know it.

Q. Anybody tell you?

A. No, sir, I know it. I read it. Read the rules is all you have to read.

Q. The rules of your road say it?

A. The rules don't say anything of the kind. It says, any time you can't give a passing whistle you must call them down or give four whistles.

Q. I asked you where between you, you have a quarter of a mile of fairway, you mean to say because you are—

A. If a man figures there ain't room enough; probably he don't know whether there is room enough.

Q. I see. Your answer is based on the theory that a man doesn't know there is room enough. I say he does know there is room enough. He sees the other fellow starting to make a maneuver and could have cleared—under those circumstances, is he entitled to hold him back?

A. Yes, by the law he is; yes.

Q. Why?

A. Because he couldn't give the passing whistle; his vessel wasn't under control. [431]

Mr. WOOD.—You musn't ask about this particular case; this is a hypothetical question.

Mr. FULTON.—This is your witness.

COURT.—This is cross-examination.

Q. Now, you say that if you are on the bridge of the "Kern" and you see a vessel a quarter of a mile away, and that vessel signals for permission to pass

(Testimony of Edward Anderson.)

to your starboard, and you at that time knew he could pass in safety, if, when he blew the one whistle you had responded at once and he had gone on the course—I am presuming that now—if you knew that, knew that he could pass in safety—that if he had followed the one-whistle signal he would have passed in safety, would you, under those circumstances, have given four whistles?

A. No, if I absolutely knew there was no danger of a collision I would have given him one. If I absolutely knew there was no danger.

Q. That is to say, if you knew he could make that maneuver.

A. If I knew he could; but I would have to be positive if my vessel was not under control.

Q. But in a quarter of a mile of water he can make the maneuver, can't he? A. What is that?

Q. If the "Elder" is a quarter of a mile away, he can make the maneuver easily to pass through that eight hundred feet of clearance?

A. I suppose he can.

Q. Be frank with me.

A. Yes, he can port his helm.

Q. And get over with plenty of room?

A. The "Elder" can port his helm. [432]

Q. He had plenty of time to get over? A. Yes.

Q. If you were in command of the "Elder" you wouldn't have had any difficulty in a quarter of a mile in passing the "Kern" in the position she was in? A. If I was pilot of the "Elder"?

Q. Yes.

(Testimony of Edward Anderson.)

A. I don't think there would have been any collision.

Q. I am not asking you that question. I didn't ask you that. Now, if you had been the pilot of the "Elder" and you had been a quarter of a mile astern and you wanted to pass to the starboard and one whistle is blown, could you have maneuvered so as to clear the "Kern" safely in that quarter of a mile?

A. With the "Elder"?

Q. Yes. With the "Elder."

A. Yes, sir.

Q. Then did you know who was on the "Elder" at that time—who was bringing her down?

A. No, sir; I didn't; not at that time.

Q. So that the action of the "Kern" was in no way controlled by who they thought was running on the "Elder."

A. The man is a personal friend of mine, who was pilot on the "Elder."

Q. Then the situation is this: That if you had believed, when you stood on the bridge of the "Kern," that a competent man was on the "Elder" and she gave the signal a quarter of a mile away, if you believed that at that time she could pass you safely to starboard, you wouldn't have given the four-whistle signal?

A. Yes, would have given the four whistles, the same as was done. [433]

Q. I don't understand; how do you explain your

(Testimony of Edward Anderson.)

answer, if there was plenty of room?

A. Because she is not under control.

Q. What has that to do with it; there is plenty of room to pass.

A. I can't give them the passing whistle.

Q. That is your interpretation of the law?

A. That is the law.

Q. That you say is the reason you would have blown the four-whistle signal?

A. According to the law; yes, sir.

Redirect Examination.

Q. Now, I wish to ask you one question in review of all this: If, under the circumstances, that night, you had been in the "Kern's" place, what whistle would you have blown?

Mr. DENMAN.—I object to that question. That is purely a conclusion of the witness on the facts, not on a hypothetical question.

Mr. WOOD.—Well, as an expert, he knows the facts himself. He is a witness testifying to the facts, and I think it is a proper form in which to put it. There is no use my repeating to him the very facts he has testified to.

Mr. DENMAN.—Well, he has shifted every time—

Mr. WOOD.—We object to the insinuation of counsel—shifting.

Mr. DENMAN.—I beg your pardon; I meant we got in different circumstances every time we put the question. I don't believe the Court has the right to take as an assistant on the facts of the case one of the employees of one of the parties litigant. My under-

(Testimony of Edward Anderson.)

standing of an expert witness or expert testimony, is that it shall be based upon a hypothetical question; that he [434] can't usurp the functions of the Court in deciding the case itself, and that is exactly what this amounts to.

COURT.—This man was in position to see the approach of the vessel from the rear. Why wouldn't it be competent to have him answer now what he would have done?

Mr. DENMAN.—It is purely a matter of opinion, an opinion of the witness on the theoretical question, but the very question in issue which the Court has to decide.

COURT.—What is the difference; I don't see the difference.

Mr. DENMAN.—I will withdraw my objection.

Q. What would you have done under the same circumstances as narrated, and which you, yourself, know, different from what Moran did?

A. You mean would I have done any different?

Q. Yes. What signals would you have given?

A. I would have complied with the rules of the road and blew four whistles.

Q. Now, I thought I made it clear, but counsel is evidently under a misapprehension. You are not in the employ of Danied Kern or this company now at all, are you? A. No, sir.

Recross-examination.

Q. You were at that time?

A. I were, at that time.

Mr. WOOD.—I thought you meant now.

(Testimony of Edward Anderson.)

Mr. DENMAN.—Oh, no.

Mr. WOOD.—That is all of our direct case.

Witness excused. [435]

Mr. DENMAN.—I now want to put Mr. Moran on the stand for further cross-examination, if I may.

Mr. CAMPBELL.—I object to any further cross-examination of Mr. Moran. If he wants to make Mr. Moran his own witness and call him in direct examination, that is all right.

Mr. WOOD.—It is hardly proper to recall a witness for cross-examination when the other side has closed.

Mr. DENMAN.—Here is the situation. Here are the two men who were on the “Kern,” the chief officer and the pilot. For the first time in the case we have heard the testimony of the chief officer, who was right there. We repeat, the case is not closed, so far as they are concerned, and I have discovered matters that I desire to cross-examine their other witnesses on, which I didn’t have at the time I cross-examined the first time. It is clearly within the discretion of the Court to allow me to do this. I didn’t know what this man was going to testify; I didn’t know what your case was at all, until you put your case in.

Mr. WOOD.—Well, we will put it this way, because I am inclined to think that we should not stand on any narrow technical rule of calling, as we have just put on one of our direct witnesses, and have just now, this minute, closed; but, suppose this had been in the regular course of the trial, Mr. Moran having been

(Testimony of Edward Anderson.)

thoroughly cross-examined and released, then this man had come on and testified. I don't think you can recall a witness for the purpose of further cross-examination, in the light of something further developed in the case. You can recall him and make him your own witness; as a hostile witness might be permitted to use leading [436] questions. We have dismissed him, but because you have further light I don't think you have a right to recall him.

Mr. DENMAN.—I have never been refused.

Mr. CAMPBELL.—You cross-examined Mr. Moran on one occasion, and then overnight, having had it under consideration, came back the next morning and asked to cross-examine again, and we gave our consent.

Mr. DENMAN.—That is true, and in the light of some of the things I have heard here I would like to ask further questions.

Mr. CAMPBELL.—Make him your own witness is all we ask; we don't object to that.

COURT.—Do you insist?

Mr. DENMAN.—On cross-examining, if I may.

The COURT.—The Court will exercise his discretion and will allow you to do it. [437]

**Testimony of Michael Moran, for Libelant
(Recalled).**

MICHAEL MORAN was thereupon recalled for further cross-examination and testified as follows:

Further Cross-examination by Mr. DENMAN.

Mr. CAMPBELL.—What page are you referring

(Testimony of Michael Moran.)

to now of the Inspector's Report, Mr. Denman?

Mr. DENMAN.—Page 59.

Mr. CAMPBELL.—I understood that this was for the purpose of getting at matters which were developed by Mr. Anderson.

Mr. DENMAN.—Yes.

Mr. CAMPBELL.—Now, you are referring to the Inspector's Report which you had before you at the time you cross-examined him before.

Mr. DENMAN.—That is very true, but you will see the pertinence of this in a moment.

Q. Mr. Moran, did you hear the testimony of Mr. Anderson, to the effect that the other vessel approached you from the side instead of astern?

A. I don't think I did. I wasn't in here during all of his testimony.

Mr. WOOD.—Wait a minute. I object to that statement, if we are going to be exact, because there is no such testimony in the record. Mr. Anderson said that they were approaching over the port quarter, and that is very different in nautical language to this man, from the side, the starboard quarter, I should say.

The COURT.—This witness has been all over that situation and has testified very minutely as to the position of the "Kern." Now, Anderson comes on and he gives his version as to the [438] position of the "Kern" and the two witnesses don't agree. Now, then, what is the object in calling this witness back again to re-examine him upon the same question?

(Testimony of Michael Moran.)

Mr. DENMAN.—Well, because I have discovered that his testimony before the Inspectors in that regard was practically identical with what Anderson's was this morning.

The COURT.—You want to examine him now as to what you have discovered as to his testimony before the Inspectors?

Mr. DENMAN.—No, but the two things have just come to me as being identical, that the situation as described by Mr. Anderson and as described by this man are identical situations and I didn't realize it until the testimony was given here, the identity of the two when they were testifying there and the disagreement when they testify here.

The COURT.—Well, you may examine as to that. I don't think you ought to go into a re-examination of this witness as to the position of the "Kern."

Mr. DENMAN.—I am going to ask him one question as to whether he testified as to one thing before the Inspectors.

The COURT.—Very well.

Q. Do you remember testifying before the United States Inspectors on being asked concerning what happened just after the impact, the striking of the two vessels, "Did she, in backing off, pull her with her to any extent? A. No, sir, just pulled right out of the little gap that she made. Q. Didn't change her position at all? A. No, sir. You are quite sure of that, are you? A. Yes, sir; I am dead sure of it, only when she was going ahead she changed her position; she swung around at right angles with the river. Q. Who did? A. The 'Elder' did." [439]

(Testimony of Michael Moran.)

WITNESS.—I didn't say the "Elder"—the "Kern" did. If there is anything like that there it is a mistake in the stenographer.

Mr. DENMAN.—Well, you will admit the testimony shows that, will you?

Mr. CAMPBELL.—Yes; but read the next question. It is very evident that it is a mistake.

Mr. DENMAN.—(Reading:.) "Q. I am talking about the influence she exercised over the 'Kern'?"

"Mr. FLANDERS.—After she hit?"

"Mr. FULTON.—After she hit, yes, when she tried to back away.

"WITNESS.—Oh.

"Q. I assume that the 'Elder' backed away after she hit, did she not?

"A. Yes, sir, she backed out immediately afterward."

Mr. DENMAN.—(Continuing.) Now you see the previous question was, "Did she strike her pretty hard? A. Well, I didn't consider it very hard, but she struck her hard enough to go right in. The 'Elder' is a heavy ship and she don't have to strike very hard. I presume the 'Elder' did all she could. Q. Did she, in backing off, pull her with her to any extent? A. No, sir, just pulled right out of the little gap that she made. Q. Didn't change her position at all? A. No, sir. Q. You are quite sure of that, are you? A. Yes, sir—"

Mr. CAMPBELL.—(Interrupting.) Mr. Denman, when you say, "Didn't change her position at all," whose position—the "Kern's"?

Mr. DENMAN.—The “Elder’s.

Mr. CAMPBELL.—Not at all. The antecedent is the “Kern” [440] in that question.

Mr. DENMAN.—You see the interrogator had that question in mind and said, “Yes, sir, I am dead sure of it, only when she was going ahead she changed her position; she swung around to right angles with the river. Q. Who did? A. The ‘Elder’ did.” So the interrogator at that moment was trying to find out what that situation was and they said, “Who did?” and he answered, “The ‘Elder’ did.”

Mr. CAMPBELL.—Now, if the Court please, that is a matter of argument. When you come to read those questions you see manifestly that the word “Elder” is used for the “Kern,” because this man was being interrogated about the position of the “Kern.”

The COURT.—The witness was evidently confused when he gave that answer.

Mr. DENMAN.—Well, I have got four other places in the record where he says she was swinging at the time, but this is the only place I have got it where he said she would swing around at right angles.

Mr. CAMPBELL.—What did Senator Fulton mean when he said afterwards, “I am talking about the influence she exercised over the ‘Kern’?” showing Senator Fulton himself understood what it was.

Mr. DENMAN.—No, no; here is the point; the influence she exercised when she struck and when she pulled around afterwards and when she pulled out.

The COURT.—I suggest that you read that part of

(Testimony of Edward Anderson.)

the testimony into the record and the Court will look into it.

Mr. DENMAN.—Yes. I think we have it in now, if the Court please. That is all.

(Witness excused.) [441]

Mr. WOOD.—I would like, with permission of counsel, to recall Mr. Anderson, to simply locate the models here and locate that position he was talking about on the witness stand.

The COURT.—Any objection to recalling Captain Anderson, Mr. Denman?

Mr. DENMAN.—No; no objection.

Mr. WOOD.—It is only to locate what he did here.

**Testimony of Edward Anderson, for Libelant
(Recalled).**

EDWARD ANDERSON was thereupon recalled as a witness by the libelant, and further testified as follows:

Direct Examination by Mr. WOOD.

Q. Take these models of the barges and the model of the “Kern,” and call this the Washington shore (counsel drawing pencil line on paper).

The COURT.—You will get that mixed up again. You had better call that the Oregon shore and the Washington shore over next to you.

Mr. WOOD.—I was going to have it as it actually runs, to the right.

Mr. DENMAN.—You will cut it off, won't you, anyway from the others?

Mr. WOOD.—Yes.

(Testimony of Edward Anderson.)

The COURT.—Very well.

Q. (Continuing.) And this would be downstream (counsel drawing arrow indicating); take these models and place them in the relation in which the “Kern” was lying to the barges just before the collision when you were making fast that line.

A. It is pretty hard. There is no river or anything else there. This is downstream (indicating)? [442]

Q. Downstream is this way (indicating). Here is the Washington shore and the river flowing that way (indicating).

A. Of course, the Washington shore don’t run like that.

Q. No, we are not talking about distances; just talking about the relative positions.

A. This is the “Elder” here (indicating)?

Q. Well, that is downstream. No, I haven’t marked the “Elder.” That is simply to indicate downstream.

WITNESS.—(After arranging wooden models.) If you had the outlines of the land here you could place it. That is the position of the boat.

Mr. FULTON.—You ought to give him a little more paper, really. I mean a little more room. It seems to me that is too small a piece of paper to get it on.

Mr. WOOD.—Oh, well, it will answer the purposes.

(Mr. Wood at this point drew a pencil mark along the outlines of the wooden models as the witness had arranged them on the piece of paper.)

(Testimony of Edward Anderson.)

Mr. FULTON.—Hadn't you better have in the record what you have put there?

Mr. WOOD.—What?

Mr. FULTON.—How you have marked those things?

Mr. WOOD.—When I mark the exhibit that will all speak for itself. Indicate there yourself with the pencil about what line you were getting out to the barges from the "Kern."

(Witness draws pencil line, as requested, at the ends of which Mr. Wood placed the letters A and B.)

Mr. WOOD.—Line A-B. I have marked this the testimony of Anderson, and I now offer it in evidence.

Said paper was thereupon marked by the Reporter, Libellant's Exhibit 10. [443]

Mr. DENMAN.—Now, may I ask counsel for my guidance in further cross-examination which exhibit they contend truly represents the position of these two at the time just antecedent to blowing the whistle?

Mr. WOOD.—Well, we don't say.

Mr. DENMAN.—Well, we must have it in order to—

Mr. WOOD.—(Interrupting.) No; we have put in the testimony of the witnesses, and I want to make it clear by a chart.

Mr. CAMPBELL.—Mr. Denman, you can't break away from your old habit, can you?

Mr. DENMAN.—No, I am entitled to know what position—I am not arguing the case at all; I am en-

(Testimony of Edward Anderson.)

titled to know in the course of the trial, as I understand it, what the position of my opponent is with reference to the facts in the case, what he is trying to prove, and I ask him now which does he contend is the position that he asserts in maintaining his case, the exhibit just put in or the exhibit No. 6.

Mr. WOOD.—Now, in answer to that I would say this: One witness has testified one way and made a chart; another of our witnesses has testified differently, and we are merely perpetuating in a chart what he said in testimony and when we come to argue the case we will argue those two witnesses and the two charts.

The COURT.—I don't think the counsel is called upon to say which position he takes at the present time.

Mr. CAMPBELL.—Counsel might do as he did in the late "Beaver"—"Selja" case, put opposing counsel on the witness-stand and ask him to state his theory of the case.

Mr. DENMAN.—I beg your pardon, I did nothing of the [444] kind. I put him on the stand because he himself testified prior to that time and cross-examined him on his testimony.

Mr. WOOD.—I will say this, Mr. Denman, very frankly, all of these testimonies in cases of this kind are approximate; there are none of them mathematically exact.

The COURT.—I will overrule the request. You may go on with the testimony.

Mr. DENMAN.—Of course I can't cross-examine

without knowing their theory, and I have no further cross-examination.

(Witness excused.)

The COURT.—Have you any other witness?

Mr. DENMAN.—No.

The COURT.—Have you any other witnesses?

Mr. CAMPBELL.—No.

The COURT.—Does that close the case?

Mr. CAMPBELL.—I understood counsel had one witness to call on his part of the case. If he is going to put him on we would like to have him put on before we call our rebuttal.

Mr. DENMAN.—Nothing further.

Mr. CAMPBELL.—You are not going to put the engineer on?

Mr. DENMAN.—Oh, the engineer.

Mr. FULTON.—We tried to get a subpoena served. We issued a subpoena for him. The subpoena has been returned, and I have a letter that was sent down. His headquarters are at Astoria. I had two letters in regard to it; the first letter of January 31st. He says: "I find Mr. Leahy has gone to San Pedro on the 'St. Helens,' but his people expect him here any day this week. [445] If the boat should come in so he would be able to make Portland in time to appear as a witness, I will serve him, otherwise," etc. That was January 31st, 1912. And yesterday I received a letter under date February 6th, which says: "I am returning subpoena which was to have been served on Mr. Leahy, as his boat has not arrived in this port yet. I also return the

check which you enclosed for him. Yours truly, J. V. Burns, Sheriff." There is no deputy marshal there and the marshal advised us to send it to the sheriff.

Mr. CAMPBELL.—What boat is he on, Mr. Fulton?

Mr. FULTON.—This states here that he was on the "St. Helens."

Mr. CAMPBELL.—A vessel plying on the coast.

Mr. FULTON.—Well, I really hadn't heard of the "St. Helens" before. There is the letter.

Mr. CAMPBELL.—It is a steam schooner plying on the coast.

Mr. FULTON.—He says he has gone to San Pedro.

Mr. CAMPBELL.—And you made no effort to get him before the 31st of January, did you?

Mr. FULTON.—Well, that subpoena was issued on the 29th. Ever since the case was set we have been trying to locate the man, sent to San Francisco; I suppose he was there; and they could not locate him there. Finally Mr. Denman wrote to me that they were up here some place.

The COURT.—This is the engineer on the "Elder"?

Mr. FULTON.—Yes, he was an engineer on the "Elder" at the time. Mr. Denman wrote to me just before this subpoena was issued that they were up in this country some place, he and another witness which we found, which was Smith, wasn't it?

Mr. DENMAN.—Yes. [446]

Mr. FULTON.—Smith I think it was. Anyway, one of them was found. Finally I found that he

was living down there and sent the subpoena, and you have the rest.

Mr. CAMPBELL.—What position did he occupy on the “Elder”?

Mr. FULTON.—Engineer; I forget whether the first or second.

The COURT.—Was that subpoena served?

Mr. FULTON.—No. I simply produce this to show the effort we made, your Honor, to get him.

The COURT.—To show why you didn’t get him?

Mr. FULTON.—Yes.

The COURT.—Well, what do you want to do about it?

Mr. FULTON.—Well, nothing, only it is simply to explain that we were desirous of having him here and would have produced him had it been in our power to do so. That is all.

The COURT.—You have no other witnesses, then?

Mr. FULTON.—That is all.

Respondent rests. [447]

REBUTTAL EVIDENCE.

Thereupon the following testimony was introduced on behalf of the libelant, in rebuttal:

Testimony of Andrew Hoben, for Libelant (in Rebuttal).

ANDREW HOBEN was called as a witness in rebuttal, on behalf of libelant, and having been first duly sworn, testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Captain, what is your business?

A. Marine surveyor.

(Testimony of Andrew Hoben.)

Q. Were you ever a master mariner?

A. Yes, sir; about twenty-five years.

Q. What kind of vessels? A. Sailing ships.

Mr. WOOD.—Say, Senator, your man is down here at St. Johns, your engineer, if you want to get him.

Mr. DENMAN.—Where is St. Johns?

Mr. WOOD.—Right here in town.

Mr. DENMAN.—Well, that is good.

Q. Were you ever down the river after the “Kern” was sunk? A. Yes, sir.

Q. Were you ever near her foremast where it stuck out of the water?

A. Yes, sir; I was on her deck or on logs that was above her deck. I stood right over the center of her a little abaft the foremast and around the barges. I was down there for a half a day while she was sunk.

Q. Now, Captain, could you from that position see the Eureka Cannery?

Mr. DENMAN.—Now, I object to that, if the Court please. [448]

Mr. CAMPBELL.—If it is that, it is a leading question; I will withdraw it.

Mr. DENMAN.—I am not putting it on that ground at all, but I am putting it on the ground that they opened up this proposition in the main case.

The COURT.—And you claim it is not rebuttal.

Mr. DENMAN.—I claim it is not rebuttal. They opened it up in the main case and called Captain Crowe on the proposition. Now, they can't come back and pile up their additional testimony after we have closed.

(Testimony of Andrew Hoben.)

The COURT.—What have you to say about that, Mr. Campbell?

Mr. WOOD.—We simply anticipated our rebuttal; that was all.

The COURT.—This is a matter which you ought to have put in along with the testimony of Captain Crowe.

Mr. CAMPBELL.—No, if the Court please; the question they asked Captain Crowe wasn't the question which I asked him. I asked Captain Crowe to locate the position of the wreck, and he said that he did locate it.

The COURT.—You want to ask this witness now whether he could see Eureka Cannery from the location of the wreck.

Mr. CAMPBELL.—Exactly.

The COURT.—Very well. You may ask the question. I think they are entitled to it on that ground.

Mr. CAMPBELL.—So the Court may understand, I asked Captain Crowe to locate the position of the wreck, and he said he did so by taking bearings on the tenth window of the cannery.

The COURT.—Now, you want to ask the question whether he could see the cannery from that point by the wreck?

Mr. CAMPBELL.—Yes.

The COURT.—Very well.

Mr. FULTON.—What is this done to meet? [449]

Mr. CAMPBELL.—It is to meet Captain Patterson's testimony that you could not see the position of the wreck until you passed Cooper's Point.

Mr. FULTON.—Which they brought out them-

(Testimony of Andrew Hoben.)

selves entirely, your Honor. It wasn't proper cross-examination as to that, and which they brought out themselves on cross-examination and are bound by the answer.

Mr. WOOD.—I beg your pardon. It was a voluntary statement of Captain Patterson, in which he in order to excuse himself said you could not see past the Point.

Mr. FULTON.—Well, then, we ought to be allowed to introduce testimony, I think, to—

Mr. DENMAN.—Oh, well, we will be able to introduce testimony on this proposition.

Mr. FULTON.—We may want to call Captain Moran and see what he will testify to.

WITNESS.—Just let me state this—

Mr. CAMPBELL.—(Interrupting.) I want you to answer this question: Could you, standing at the wreck of the "Kern," see the Eureka Cannery?

A. Yes, sir, from forty to fifty feet clear of all heights of land.

Cross-examination by Mr. DENMAN.

Q. What is this you have in your hand, Captain?

A. It is a report I made when I went and made the survey on October 3d, 1909.

Q. To whom did you make it?

A. It is to Mr. Kern, who engaged me to locate the position of the ship. In fact, Mr. Kern didn't engage me; it was Mr. Hewitt. [450] Mr. Henry Hewitt asked me to go down and locate the ship and take bearings for Mr. Kern. I went down, and

(Testimony of Andrew Hoben.)

those are notes I helped to prepare of the different bearings and the position of the ship.

Q. You don't want to let me have it?

Mr. CAMPBELL.—Show it to him, Captain. We have no objection.

WITNESS.—All right; with your permission. (Witness passes report to Mr. Denman.)

Mr. CAMPBELL.—I might say that we have also had Captain Crowe look up his correspondence, the copies which he has, which Mr. Denman wanted, and if he wishes it we will produce it. I simply say this for the purpose of showing there is no desire to withhold them at all.

Mr. DENMAN.—Having looked them over.

Mr. FULTON.—A wise precaution of counsel. He is to be commended.

The COURT.—I ruled on that before.

WITNESS.—I made that report at the time.

Mr. DENMAN.—Well, that is all.

(Witness excused.) [451]

Testimony of J. E. Copeland, for Libellant (Recalled in Rebuttal).

J. E. COPELAND was thereupon recalled as a witness in rebuttal and testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. What has been your experience with respect to ocean-going steamers in charge of river pilots in slowing down while passing the "Kern"?

A. I never knew them to slow down.

(Testimony of J. E. Copeland.)

Q. When she is in tow of loaded barges?

A. I never knew them to slow down.

Q. Have you ever had any difficulty at all with them?

A. We have quite a good deal of difficulty with them, but they never have slowed down.

Mr. DENMAN.—I submit this is irrelevant, your Honor. What practice they follow has nothing to do with this case.

Mr. CAMPBELL.—If the Court please, they went into this matter in their own case.

Mr. DENMAN.—All right; let it go.

Mr. CAMPBELL.—Captain Patterson testified that the reason he slowed when he rounded Cooper's Point, was because he was in the habit of slowing when he passed the "Kern."

Mr. FULTON.—He answered that in response to you on cross-examination, though. We didn't put any proposition of that kind in.

Mr. DENMAN.—I have no objection, your Honor.

The COURT.—You may go ahead.

Q. Captain, will you state whether or not it was physically possible to turn the searchlight of the "Kern" around so as to throw the light back over the stern of the "Kern"? A. It was not. [452]

Q. Why not?

A. Because in the construction of the searchlight there is two flanges, you understand; one works on top, the other on the bottom. A bolt came up through the pilot-house and fastened the bottom

(Testimony of J. E. Copeland.)

flange and another bolt went down through the top flange and fastened the searchlight, and around the heads of these bolts were caps; and it could not be turned more than so as to shine just abeam, no further around either way.

Cross-examination by Mr. DENMAN.

Q. Were you ever tried by the United States Inspectors here for any violation of the rules?

A. I was.

Q. And how many times? A. One time.

Q. What did they do?

A. Suspended my license for five days.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—Did they suspend your license, or find you at fault, in the collision under trial now?

A. No, sir.

Mr. DENMAN.—Did they try you?

A. No, sir.

(Witness excused.) [453]

Testimony of Michael Moran, for Libelant (Recalled in Rebuttal).

MICHAEL MORAN was recalled as a witness in rebuttal, and testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. How long were you on the “Kern”?

A. At that time?

Q. Yes. A. About three weeks.

Q. Will you state whether or not any of the ocean-going steamers in charge of river pilots were or were not in the habit of slowing down when they passed

(Testimony of Michael Moran.)

these barges in tow of the "Kern"?

A. No, sir; I never knew any of them to slow down.

Cross-examination by Mr. DENMAN.

Q. Could you say that the "Elder" did not slow down this night coming around Cooper's Point?

A. I don't know whether she did or not. They were not in the habit. He asked me if they were in the habit of slowing down when they passed these barges by. They were not in the habit.

Q. Did you see her coming around Cooper's Point?

A. Did I see her?

Q. Yes.

A. I never saw her until they blew the whistle, only when I was heading upstream before I let go of my light barges I saw a steamer at Oak Point.

Q. Could you have seen her before coming around Cooper's Point?

Mr. CAMPBELL.—Now, if the Court please, he is going over this matter again.

A. I testified before the Inspectors I wasn't sure whether I [454] could see her or not, but I thought I could not. That is what I testified to before the Inspectors.

Q. Do you remember testifying as follows:—

Mr. CAMPBELL.—(Interrupting.) If the Court please, he is going back into old matters.

The COURT.—I was just going to say this is not proper cross-examination of what was brought out on the rebuttal. We want to get to an end of this case.

Mr. DENMAN.—Well, I want to ask this one question, if I may, and I think it will prove to be pertinent, and it is a proper interrogation in view of the evidence of this Captain here as to what could be seen up the stream, the expert that was put on; and here is the question: Did you not testify before the—

Mr. CAMPBELL.—(Interrupting.) If the Court please, I object to even asking the question. Does the question relate to the question I have asked him as to the custom of these pilots in passing with the steamers?

Mr. DENMAN.—No. It relates to the testimony of your expert here now as to what could be seen upstream, which is a part of your main case.

Mr. CAMPBELL.—Then you are not confining your cross-examination to matters I have touched upon in my direct examination.

The COURT.—If you want to prove that, Mr. Denman, you will have to make the witness your own witness, because this is not cross-examination of what was brought out. That is to say, the Court would have to give you leave to introduce further rebuttal, or surrebuttal, whatever you might call it, on that matter in this case.

Mr. DENMAN.—Well, I think it is in, your Honor. I will let it go.

(Witness excused.) [455]

**Testimony of Joseph O. Church, for Libelant
(Recalled in Rebuttal).**

JOSEPH O. CHURCH was next recalled as a witness in rebuttal, and testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Captain, will you state whether or not ocean-going steamers in charge of river pilots were or were not in the habit of slowing down when they passed the "Hercules" in tow of barges?

A. I never knew any of them to slow down.

Mr. CAMPBELL.—That is all.

Mr. DENMAN.—That is all.

Cross-examination waived.

(Witness excused.)

Mr. CAMPBELL.—If the Court please, to make the record clear I want to read into it the complete questions and answers which were asked by the Inspectors of Mr. Moran, in respect to which Mr. Denman questioned him and with respect to which Mr. Denman contended that he had testified that the "Elder" was at right angles across the river.

Mr. DENMAN.—What page?

Mr. CAMPBELL.—This is on page 58. (Reading:)

"Q. Now, when she struck the 'Kern' did she penetrate well into her? A. Yes, sir, pretty well into her.

"Q. Struck her pretty hard? A. Well, I didn't consider it very hard, but she struck her hard enough to go right in. The 'Elder' is a heavy ship and she

(Testimony of Joseph O. Church.)

don't have to strike very hard. I presume the 'Elder' did all she could.

"Q. Did she, in backing off, pull her with her to [456] any extent? A. No, sir, just pulled right out of the little gap that she made.

"Q. Didn't change her position at all? A. No, sir.

"Q. You are quite sure of that, are you? A. Yes, sir, I am dead sure of it, only when she was going ahead she changed her position; she swung around at right angles with the river.

"Q. Who did? A. The 'Elder' did.

"Q. I am talking about the influence she exercised over the 'Kern'?

"Mr. FLANDERS.—After she hit?

"Mr. FULTON.—After she hit, yes, when she tried to back away.

"WITNESS.—Oh!

"Q. I assume that the 'Elder' backed away after she hit, did she not? A. Yes, sir, she backed out immediately afterward.

"Q. Yes. Now, when she backed away, did she draw the 'Kern' after her, or not? A. No, sir, not that I could see; not that I could notice.

"Q. Push her to one side or the other? A. Not when she was backing, she couldn't.

"Q. Did she at any time? A. No. When she struck her going ahead, of course she screwed her right around."

Mr. WOOD.—We want to offer these models that were drawn to scale of the "Elder," the models of the three barges, the "Kern" and the "Elder."

Thereupon the three wooden models representing

the barges were marked Libelant's Exhibit 11, the wooden model representing the "Daniel Kern" was marked Libelant's Exhibit 12, and the wooden model representing the "Elder" [457] was marked Libelant's Exhibit 13.

Proctors for libelant also offered in evidence a photograph, which was marked Libelant's Exhibit 14.

The COURT.—Do you want anything else in the record?

Mr. DENMAN.—This, which is a continuation of what Mr. Campbell read.

The COURT.—Very well.

Mr. DENMAN.—“Q. Which way did she drive her? A. Drove her right clean ahead of her, swung around between the barges. Q. Did she drive her to port or starboard? A. Drove her to port.” That is all.

Mr. FULTON.—If the Court please, since counsel has deemed it necessary to put some of this matter in the record there is a matter that we would like to have go into the record so as to explain fully what our contention is Mr. Moran's position was in respect to that, namely, what he did testify to before the Inspectors as to a vessel being concealed as it approached Cooper's Point from the position of the wreck. I would like to read just a short portion into the record.

Mr. CAMPBELL.—I object to it, because it is going back into cross-examination again, upon which your Honor just ruled. It is the very question Mr. Denman asked and your Honor ruled against.

Mr. FULTON.—We have as much right to put this in as they had to put the other in.

Mr. WOOD.—I would like to ask the purpose of this. Are you putting this in as testimony to prove the fact?

Mr. FULTON.—To show what Moran did say. He has given part of it and the Court stopped it. There is no question [458] about this being the record. Let us have it in, just what he did say.

The COURT.—How much is there of it?

Mr. FULTON.—Oh, less than a half page.

The COURT.—You may read it in.

Mr. CAMPBELL.—Under those circumstances will you consent to our going through the record and picking out all the excerpts we want from the testimony of the witnesses?

Mr. FULTON.—We will determine questions as they arise.

The COURT.—Of course, we will have to have an end of this. If this is going to lead to something else I will not allow it.

Mr. CAMPBELL.—It certainly will lead to re-examining Captain Moran.

The COURT.—I will not permit it, then, if it is going to lead to that.

Mr. FULTON.—“Question—

The COURT.—Never mind. I will sustain the objection.

Mr. FULTON.—I thought your Honor said I could read it?

The COURT.—I did say so, but if it is going to open up the case again I will have to rule it out.

Mr. FULTON.—Well, I am sorry I didn't read it quickly.

Mr. DENMAN.—If the Court please, we will try to get this engineer here by two o'clock, but I don't think his testimony is very pertinent.

Mr. FULTON.—What is the use unless they want him? It will be merely cumulative. Unless they want him I would not bother about him.

Mr. DENMAN.—Do you want the engineer, Mr. Campbell?

Mr. CAMPBELL.—It is a question of whether you want him [459] or not. It is usually customary, you know, to call all of the officers.

Mr. WOOD.—We don't want him if you don't. We are not going to go into your camp; it is for you to say.

Mr. DENMAN.—We will try to get him here by two o'clock.

Mr. WOOD.—We are perfectly willing that you shall have him.

After discussion between counsel as to the argument of the case, the court took a recess until two o'clock P. M. of this Thursday, February 8th, 1912.

Thursday, February 8, 1912, 2 P. M.

Mr. DENMAN.—If the Court please, the "St. Helens" has left for sea. She came in unbeknown to us; was in port here and had gone. We were looking for service by the marshal in Astoria and received these letters back and presumed it was all right. I find she left last night and went down the river, and we will be unable to produce this witness now.

Mr. CAMPBELL.—How long was she in port?

Mr. DENMAN.—I don't know. I didn't know she was here. I was astonished when I found she was here.

Filed April 12, 1912. A. M. Cannon, Clerk. [460]

And afterwards, to wit, on Saturday, the 1st day of April, 1916, the same being the 24th Judicial day of the regular March, 1916, term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [461]

*In the District Court of the United States for the
District of Oregon.*

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corpora-
tion,

Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,

Respondent.

CHARLES P. DOE,

Claimant.

**Minutes of Court—April 1, 1916—Order Referring
Matter of Payment of Damages to Special Mas-
ter.**

ORDERED that the matter of ascertaining the amount of the damages to which the libelant Colum-

bia Contract Company may be entitled be referred to Mr. A. M. Cannon as a special master to take the testimony and report the amount of the damages.

April 1, 1916.

CHAS. E. WOLVERTON,
Judge.

Filed April 1, 1916. G. H. Marsh, Clerk. [462]

And afterwards, to wit, on the 5th day of October, 1916, there was duly filed in said court a Report of Special Master, in words and figures as follows, to wit: [463]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of COLUMBIA CONTRACT CO.,
Libelant,

vs.

Steamer "GEORGE W. ELDER,"
Respondent.

**Report of the Commissioner upon the Amount of
Damages to be Awarded the Libelant Under the
Decree Heretofore Entered Awarding Damages.**

To the Honorable District Court Above Named:

Pursuant to the order of Court referring the above cause to the undersigned as commissioner to report upon the amount of damages sustained by the libelant in the collision herein, I have the honor to report that the parties with their proctors appeared before me at dates appointed and submitted their proofs, and having considered the same, I adduce therefrom the following:

FACTS.

After the collision and the sinking of the "Kern," libelant notified or requested respondent to raise and repair the vessel, which offer was declined. Thereupon libelant undertook and accomplished the work.

In and about this work the following expenditures, costs and damages were incurred or suffered, viz:

A—RAISING THE VESSEL.

1. Libelant directed to the task an expert as to whose ability there is, and can be, no question. Bringing his skill [464] and experience to the situation, he pursued the most reasonable and feasible plan of raising the boat; indeed, I take it, he adopted the only method that could have been employed, since his work is not questioned by the respondent. The time consumed by him was about eight weeks, during which period there were engaged two crews of men continuously, two barges, a scow, wrecking pumps, cables, and much miscellaneous equipment not necessary to detail, all of which was furnished or hired by libelant. It has offered in evidence an itemized list of these expenditures accompanied by vouchers denoting the payment of each item claimed for, which is marked "Damage Exhibit E" and accompanies this report.

The fact that these sums were actually and necessarily expended by libelant on the job is not, as I understand it, at least so far as the labor is concerned, questioned by respondent, and the labor account must therefore be allowed as claimed, totaling \$10,560.77.

2. Libelant also claims on this account, demur-

rage for the use of two barges, one of 1600 tons and the other 1400 tons, dead weight capacity, pumps, scows, boilers, tackle, engines and other equipment, \$100.00 per day for sixty-three days. It is asserted by respondent that this claim is excessive.

Mr. D. C. O'Reilly, who has navigated boats and barges upon the Willamette and Columbia Rivers for some years, and both let and hired similar outfits, places the reasonable value of the use of this equipment at that date at \$85.00 per day. Being a disinterested and competent witness, I am disposed to take his statement as substantially correct, more especially as respondent offered no countervailing testimony, and this item is therefore recommended to be allowed at the sum of \$5,355.00. [465]

3. The "Kern" was, in effect, pried out of the water. To do this barges were placed alongside and large timbers were passed across the decks of the barges, securely fastened thereto by means of cables passed around the frames, so as to prevent the barges from tipping when the pries were used to lift the "Kern" so that cables might be placed beneath her. This required the tearing up of a considerable portion of the decks and the cutting of the frames of the barges, all of which had to be repaired. Respondent claims this cost ran to \$750.00 on one barge and \$300.00 on the other. The claim is not disputed and the amounts should be allowed. The total cost, therefore, of raising the boat out of the river channel was \$16,956.77.

B—REPAIRING THE "KERN."

The damage to the "Kern" was extensive; she was

cut to the keel, slightly forward of her starboard quarter, practically sliced in two; "she had a twist; her stern was leaning to port and her stem was starboard." In order to be repaired her fastenings had to be loosed a considerable distance forward of the wound and the vessel aft that point was practically rebuilt. Libelant has offered in evidence a detailed list of the expense in this connection, accompanied by vouchers, which is marked "Damage Exhibit I," and accompanies this report. The total of this expense, including labor and material, was \$19,174.83.

No proof has been offered by respondent that these sums were captiously or injudicially laid out, or that the work could have been done more reasonably, or that what was done was unnecessarily done. I therefore find that these items of expense were reasonably and necessarily incurred. [466]

C—DEMURRAGE.

I find that the "Kern" was out of commission from August 18, 1909, to as late as April, 1910. Libelant makes claim for compensation for the loss of use of boat from the date she was sunk to January 1, 1910, only, at the rate of \$50.00 per day. There is no dispute whatever in the record but that her value for hire upon the open market, at that time, was at least that much per day. I therefore find that demurrage for the time claimed is the sum of \$6,750.00.

CONCLUSIONS OF LAW.

As stated, the fact that in raising and repairing the boat libelant, in good faith, expended the sums of money above mentioned is not seriously questioned. Respondent contends, however, that the cost is far

too great as compared with the value of the boat at the time of the disaster, and that in incurring such expense libelant exceeded its rights. With this idea in view, it has introduced some proof that more was expended in raising and repairing the vessel than she was worth upon the market. Libelant's proof, on the other hand, upon this point, makes the boat worth much more, and I think she was. This raises the only question of law in the case; that is to say, assuming that more was expended in raising and repairing the boat than her actual worth at the time of the collision, was libelant notwithstanding justified in proceeding as it did to raise and repair the boat? As to this, I understand the rule to be that where the owner of a boat, in good faith, proceeds to raise and repair her, when damaged and sunk in a collision, and in doing so finds it necessary to expend more [467] than the total value of the boat at the time of the accident, he may nevertheless recover all such costs from the offender. I assume that it is meant by this that such owner must exercise his honest judgment, must avoid extravagance, and must not captiously start to build an entire new and better boat at the other party's expense. There is no charge of anything of this nature in the record. On the other hand, I am convinced that libelant proceeded with due caution and expended nothing upon the boat, either in raising or repairing her, that was not absolutely required, and the proof is that she was not so good a boat, when repaired, as before the collision. This brings libelant well within the rule, as

illustrated by the following authorities:

Spencer on Marine Collisions, 357;

The America, 11 Blatchf. 445;

The Mary Eveline, 14 Blatchf. 497.

I find, therefore, as matter of law, that libelant is entitled to recover of and from the respondent the sum of \$41,839.83, damages and demurrage herein, together with interest thereon at the rate of six per cent per annum from the 1st day of May, 1910, the date of the completion of the repairs, until paid, together with its costs and disbursements upon this hearing.

I hand up with this report the testimony adduced before me and all the exhibits in connection therewith.

Respectfully submitted, this 5th day of October, 1916.

A. M. CANNON,
Commissioner.

Filed Oct. 5, 1916. G. H. Marsh, Clerk. [468]

And afterwards, to wit, on the 5th day of October, 1916, there was duly filed in said court the Testimony Taken Before the Special Master, in words and figures as follows, to wit: [469]

*In the District Court of the United States, for the
District of Oregon.*

COLUMBIA CONTRACT COMPANY,
Libelant,

vs.

Steamer "GEORGE W. ELDER,"
Respondent.

**Proceedings Had Before Special Master, Portland,
July 17, 1916.**

Portland, Oregon, Monday, July 17, 1916.

IRA A. CAMPBELL and ERSKINE WOOD,
for Libellant.

SANDERSON REED, for Respondent.

Before A. N. CANNON, Commissioner.

Drake O'Reilley	2				
Daniel Kern	7	47	56	68	118
Theodore Knudsen	23	74	116		
F. A. Ballin (for respondent)	85				
R. C. Hart (for respondent)	93				
J. E. Copeland	95	112			
William B. Honeyman	98				

[470]

Portland, Oregon, Monday, July 17, 1916,
2 P. M.

Testimony of Drake O'Reilly, for Libellant.

DRAKE O'REILLY, a witness called on behalf
of the libellant, being first duly sworn, testified as
follows:

Direct Examination.

Questions by Mr. WOOD:

Mr. O'Reilly, will you state what experience you
have had in the business of towing and shipping?

A. Well, I have been in the towing and lightering
business on the river here for about sixteen years,
and more or less in touch with the shipping business
generally. I am a member of the Port of Portland
Commission who have more or less to do with it, also.

(Testimony of Drake O'Reilly.)

Q. What is the name of your towing company?

A. We call it the Diamond O Line.

Q. As a part of the business of that company do you rent and hire boats and barges? A. We do.

Q. Are you familiar with the steam tug "Daniel Kern"? A. Yes, I know her pretty well.

Q. What would you say would be the reasonable value per day of the "Daniel Kern" if she were hired out as a bare boat? I will ask you now and then in 1909 or thereabouts.

A. We have to pay when we charter a boat of that power, we have to pay anywhere from forty to seventy-five dollars a day for it according to the supply and demand. I should say in the neighborhood of fifty dollars would be a market price, charter price, would be for a boat of that power.

Q. Do you mean at the present time? [471]

A. Yes, I think if you would get a boat now you would have to pay that for it.

Q. Mr. Reed suggested I should ask you the value at the time when she was sunk, which would be along in 1909. Would it be any different from what you have said?

A. 1909? I don't think it would. I think that a pretty active season. I think towboats of that type were as scarce then as they are now. I don't remember the exact condition of the market then, though.

Q. In the conduct of your business of the Diamond O Line you have a good many barges and scows and things of that kind you rent out and use, etc.?

A. Yes, that is our business.

(Testimony of Drake O'Reilly.)

Q. The barge and towing business is particularly your business? A. Yes.

Q. In raising this steamer "Kern" the following equipment was used: The barge "Washtucna" of a capacity of 1,600 tons dead weight, and barge No. 17, capacity 1,400 tons dead weight. On each barge were two wrecking pumps and two steam boilers, also one hoisting engine, tackles, block wires and connections. Also one scow barge. I would like to ask you what, in your opinion, would be a reasonable charge per day for those barges of that dead weight tonnage I have given and with that equipment?

A. Well, we charge for a barge of six or eight hundred tons capacity, we charge fifteen dollars a day, and a barge a greater tonnage would necessarily be of a relative price, and I should say that that ought to be worth twenty-five dollars a day, anyway.

Q. For each barge, you mean? A. Yes, sir.

[472]

Q. And taking into account the equipment that were on those barges, what would you say as to that?

A. Well, pumps—when we have to rent O. R. & N. wrecking pumps we pay five dollars a day for them and the hoisting engine of an ordinary type we generally have to pay about \$2.50 a day for it. Engines are much more plentiful than pumps. I don't know what the capacity of those pumps are or what the size of the engine.

Q. Well, the libelant here claims that these two barges and the scow with the equipment that I have named, two wrecking pumps, two steam boilers,

(Testimony of Drake O'Reilly.)

hoisting engines, etc., were reasonably worth \$100.00 a day; that is for the whole outfit. Would you say that was reasonable or excessive, or what would you say as to that?

A. Well, was there any outfit besides what you read?

Q. That is all the outfit that I know of; the "Washtucna" of 1,600 tons capacity and No. 17 at 1,400 tons capacity.

A. The two big barges and one scow?

Q. One scow.

A. Well, of course, I put my judgment as to the value of these larger scows at \$25.00 a day. Based on that it would figure up \$85.00—what you would have to pay would figure up about \$85.00 a day.

Q. For the total equipment that I named?

A. Yes, it may be that I put the—the value of the largest scow, it might be worth more. More, depending on what she was worth.

Cross-examination.

Questions by Mr. REED:

In the estimated price of \$50.00 per day for the "Kern" who paid the operating expenses?

A. Operating? Why, this included—there is only one man in [473] charge; that doesn't include any towing. Those prices don't include any towing; that is just one man in charge.

Q. In charge of what? A. Of the barge.

Q. Was the "Kern" a barge?

A. Oh, the "Kern." I thought you said the barge. No, that doesn't include the operating.

(Testimony of Drake O'Reilly.)

Q. So what would be her net profit, then, per day?

A. Her net profit?

Q. Yes. A. Well, it might be nothing.

Q. What?

A. How do you mean? I don't know.

Q. Well, as I understand you—

Mr. WOOD.—I asked him the value of the bare boat on the market, if she were to be hired out as a bare boat. He said \$50.00.

Q. Is it your understanding that they would take the boat and just lease her for \$50.00 as she lay?

A. Yes, sir.

Q. Just as she was?

A. We had to pay at one time \$50.00 a day for the "Sampson" and on top of that we had to pay for the marine insurance, just the raw boat. And based on what the Puget Sound people and the Red Stack people in San Francisco had asked us to pay for the boats when we wanted charter, that is along that neighborhood.

Q. Do you remember whether or not there was any particular demand for boats like the "Sampson"—I mean like the "Kern"?

A. I can't remember just what the conditions were at that time.

Q. All that I understood you to testify to, Mr. O'Reilly, in [474] regard to the scows at the time of the raising, was a *per diem*, per month?

A. Yes.

Q. For the two barges and the small boat?

(Testimony of Drake O'Reilly.)

A. What they might be worth in this market in the river.

Q. *Per diem*? A. Yes, sir.

Witness excused.

Mr. WOOD.—I just called Mr. O'Reilly to let him get away. I have other witnesses on the same line. I am ready to take up these bills as the other witnesses are not here. [475]

Testimony of Daniel Kern, for Libelant.

DANIEL KERN, a witness called on behalf of libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. WOOD:

Mr. Kern, what is your position in the Columbia Contract Company, the libelant in this case?

A. President and manager.

Q. Were you occupying the same position in 1909 when this collision occurred? A. Yes, sir.

Q. State whether or not you have rented the "Kern" or the "Sampson" or other of your tugs in this market? A. Yes, sir.

Q. On the Northwest coast here, anywhere?

A. Yes, sir.

Q. Which ones have you rented out?

A. I never rented the "Kern" out. I rented the "Sampson" and the "Biddle."

Q. What are the "Sampson" and the "Biddle"?

A. I rented the river boats out.

Q. What are the "Sampson" and the "Biddle"?

(Testimony of Daniel Kern.)

A. Propeller boats. Same class of boats as the "Kern."

Mr. REED.—Were the "Sampson" and the "Kern" the same class of boats?

Mr. WOOD.—Yes.

Q. Can you state what you got for these boats when you rented them out?

A. We got \$60.00 a day from the port of Portland for the steamer "Biddle," tug "Biddle"; and we had rented the "Sampson" out to Carey in San Francisco for a period of about four [476] months; we had \$200 a day for her. That included the coal and crew. That probably netted us about \$75.00 a day for the boat.

Q. When was that, Mr. Kern?

A. That was in 1907.

Q. When was it you rented the "Biddle"?

A. I think that was last year, 1915.

Q. That is when you got \$60.00 a day for it?

A. Yes.

Q. Was that the bare boat? A. Bare boat.

Mr. REED.—What boat was that for?

Mr. WOOD.—The "Biddle."

Mr. REED.—I move to strike out the testimony of the witness with regard to the "Biddle" for two reasons: In the first place, there is a matter of six or seven years difference in time with regard to time of the contract. In the second place it is an entirely different boat. Where was it, San Francisco; the "Biddle"?

A. Oh, no, here at the mouth of the river.

(Testimony of Daniel Kern.)

Q. I think he has already stated. If he has not I will ask him. Is the "Biddle" a similar boat to the "Kern"? A. Yes, sir.

Q. And how do the general conditions as to the amount you can get for a boat compare now and when you rented the "Biddle," with conditions in 1909?

A. That class of boat is about the same. I rented a tug in Grays Harbor the year before that; I think it was the year before, the "Traveler." I paid \$50.00 a day for her for a period of two months—\$1,500.00 a month.

Q. That is, you rented her? [477]

A. We rented the "Traveler" and she was not as good a boat as the "Kern."

Q. She wasn't as big a boat, was she?

A. Oh, no. That is for the naked boat, without any crew or fuel or anything. And that same year that we rented the "Traveler," I rented the tug "Wallacut" for eight hours a day and paid \$125.00 a day for her.

Q. I suppose that was with crew?

A. With crew.

Q. And fuel? A. Yes.

Q. Now, have you rented these barges?

A. Yes, sir.

Q. Which barges did you use down there in raising the "Kern"?

A. We raised with the barge "Washtucna" and one we called No. 17, I think it was.

Q. What is their capacity, do you remember?

(Testimony of Daniel Kern.)

A. One is about 1,200 tons capacity and the other was 1,600 tons.

Q. Do you remember the equipment they had on them?

A. They had two large pumps and hoisting engines. The biggest one had hoisting engine and boiler and other gear. I don't remember exactly what it was.

Q. Did you have any other equipment there in the shape of scows or anything like that?

A. We had one other small scow.

Q. Have you ever rented out those barges?

A. I only rented—I rented those barges, one of those barges on one occasion for about two months at \$40.00 per day.

Q. Forty dollars per day?

A. Yes, to Mr. Wakefield.

Q. Which one of the barges was it?

A. We had four of them, all exactly the same size. I think it was the "Wallacut" he had. [478]

Q. But identically the same kind of a barge as the "Washtucna"? A. The same kind of a barge.

Q. When was it you rented to him, what year, I mean?

A. I think it was shortly after that when they started to build the Tillamook Railroad. I don't know exactly what year that was.

Q. How did the market price of barges per day compare when you rented to Wakefield to this time when raising the "Kern"? A. About the same.

Q. Mr. Kern, what in your judgment is a reason-

(Testimony of Daniel Kern.)

able charge per day for the use of these barges and scows and equipment they had on them?

A. Well, about a hundred dollars a day at that time. At that time that is what I concluded to be a reasonable charge.

Q. As president and general manager of the Columbia Contract Company did you go down to the scene of the wreck and take any part in superintending the raising of it?

A. Well, I was down there several times and stayed for a day or so.

Q. I wish you would describe in a general way how the vessel lay in the river; the depth of the water she was in, if you know, and the damage that was done to her and how you raised her, etc.

A. Well, the vessel was sunk about seventy miles from Portland down the Columbia River, and the water was—the river there, I suppose, a mile wide. Though I never measured the water, I understood the vessel was sunk in some seventy to ninety feet of water.

Q. How did she lie in the river?

A. Crosswise of the river, at right angles with the current, and she laid over on her side with the mast pointing up the river. [479]

Q. Did she lie on the bottom; that is, imbedding herself in it or not?

A. I was told that she imbedded; I don't know.

Q. Well, if you were just told about it I will leave that out. How was the current of the river there?

A. Very swift; very rough when the wind blew.

(Testimony of Daniel Kern.)

Q. Will you state in a general way what damage was done to the "Kern" by the collision?

A. Well, this boat struck her about, I should judge, about fifteen feet of the stern, kind of quartering, and she cut her clear into the keel and broke her coupling on the shaft and bent the shaft.

Q. What did the collision—what effect did the collision have on the stern of the "Kern"?

A. Well, we had to take and rebuild her from the stern several feet forward; I don't know exactly how many feet.

Q. Can you describe the operation of raising her, how you accomplished it?

A. Well, we had a barge on each side with timbers across and timbers that were worked under jacks on the side; and we sunk those barges when the tide was low.

Q. How would you sink them?

A. Valves; valves in the barges let the water in and we pumped them out; when the tide commenced to raise we commenced pumping the barges out; lifted the boat that way as much as we could.

Q. Then what did you do after you had lifted her as much as you could?

A. We had a long line anchored over towards the shore and we pulled her out of this hole just as fast as she raised, [480] with these engines we had on these barges.

Q. Was that when the tide went out again?

A. We shortened up on the chains and took another lift on her.

(Testimony of Daniel Kern.)

Q. Then, as I understand you, you would lift her as much as you could when the tide came in, work her over towards the shallower water?

A. Carrying her ashore all the time until we got to where her deck was out of water.

Q. And when the tide fell and the barges lowered by the side of the "Kern" again, you took a new hold and took a new lift; is that it? A. Yes, sir.

Q. How did you get hold of the "Kern" to lift her?

A. In the first place got a wire under the transom; we raised the stern up and then we worked the wires forward until we got enough wires and chains under her to raise her.

Q. That is, the wire passed underneath her hull?

A. Yes, sir.

Q. Wires and chains. Who paid the wages of the men and the other expenses of raising?

A. The Columbia Contract Company.

Q. And who signed the checks?

A. I signed most of them, and the others—bills that I didn't sign were all O.K.'d by me and made up by the bookkeeper.

Q. And when it came to repairing her who signed the checks for that? A. I did.

Q. And what did you do in writing out these checks towards keeping a memorandum of what the checks were for?

A. They were endorsed on each check what they were issued for. [481] There wasn't any vouchers attached.

Q. I wish you would explain, Mr. Kern, the sys-

(Testimony of Daniel Kern.)

tem of bookkeeping that you used in the Columbia Contract Company with particular reference to the number of the voucher and check and the number of the bill that it is in payment of, etc.

A. Explain the system.

Q. What I want to ask about particularly is when you see a check with a number stamped on it, what does that number indicate?

A. That number indicates the number of the voucher, and that number is on the record book and we can always find that, refer to it.

Q. So that if a voucher or check bears a certain number you can turn to your record book and it is in there under there under that same number?

A. Yes, sir; the vouchers are all accounted for; have to account for all those vouchers.

Q. And what is done, if anything, in the way of numbering the bills that are sent to you for payment with a number corresponding to the number on the check?

A. They are all stamped.

Q. With the same number?

A. Same number; duplicate numbers.

Q. I have noticed in going through these bills and checks and vouchers, and it will be evident when I put them in evidence, that in many instances the voucher check is not signed, but that you have signed a similar white check yourself and it is pinned to and attached to the voucher; why is that?

A. The way that happened is that our head office is at the quarry above Vancouver and this work was all done in Portland [482] here. Of course when

(Testimony of Daniel Kern.)

a man came up for his pay—we had an office in the Sherlock Building—of course when a man came for his pay we couldn't send him up to the quarry very well to get his money, so we issued those checks.

Q. The white checks?

A. The white checks, and they were sent to the quarry and attached to these vouchers and took their regular place in the record book.

Q. How were they sent to the quarry?

A. They were sent from the bank to the quarry.

Q. After these checks were cashed by the bank, the bank in making its monthly statement to the Columbia Contract Company would send them to the head office? A. Yes, sir.

Q. At the quarry, and they would there be filed with the corresponding voucher with the same number? A. Yes, sir.

Q. When a bill comes in to your office for anything that your company has purchased, what is done to inform the bookkeeper what account he is to charge it to? How does he know?

A. When I O. K. a bill I generally make a memorandum of what account to be charged to.

Q. Now, you say when you O. K. a bill; does every bill have to be O. K.'d?

A. Yes, every bill has to be O. K.'d by somebody who has knowledge of it, before it is paid.

Q. Are you the person who generally O. K.'s?

A. No; we have a superintendent at the quarry who O. K.'s a good many bills; we have a superintendent across the river; he O. K.'s a good many bills.

(Testimony of Daniel Kern.)

If the bookkeeper orders goods [483] himself, he O. K.'s the bill.

Q. The man who puts the O. K. on it has to know what it is for? A. Yes.

Q. Was there an account kept in your office known as the account of raising the "Kern," for example?

A. Yes, sir.

Q. And how about an account for repair work on the "Kern"?

A. We kept an account of repairs.

Q. So that in any of these bills—I show you a bill attached to voucher 24,454. This bill has on it, "Charge raising the 'Kern,' and I want to know if that is an example of what you mean about charging these different bills to the account to which they belong? A. Yes, sir.

Mr. WOOD.—Now, I have tried in that general way to indicate about their system, etc. If you want to ask anything more about it, Mr. Reed, you are welcome to, but I am now ready to make an attempt to get together.

Mr. REED.—I will ask a couple of things about the facts and then we will do that.

Cross-examination.

Questions by Mr. REED:

Are the "Wallacut" and the "Kern" the same size?

A. No, I think the "Wallacut" is a smaller boat, differs in size.

Q. Were they used for the same purpose?

A. About the same purpose.

(Testimony of Daniel Kern.)

Q. Well, isn't it a fact that boats like these lay around frequently without any particular use, or were they in demand at all times?

A. Oh, there are times, of course, dull spells, but not very [484] often. That boat was busy at that time.

A. Was the "Kern" similar to the "Wallacut" in power? Was the "Kern" a bar tug?

A. I don't know what power the "Wallacut" had, but the "Kern" done the same work that the "Wallacut" done for us.

Q. For you? A. Yes.

Q. That is, taking the scows down from the quarry to the mouth of the river?

A. The "Wallacut" only came up about as far as Brookfield; we towed them as far as Brookfield with another boat and she took them from there down.

Q. Were you intending to have it understood that a boat like the "Kern" could pull in \$50.00 a day?

A. She should if she was employed.

Q. I beg pardon?

A. She should if she was employed; yes.

Q. I mean, would she be employed?

A. Well, she is employed most of the time. Of course I never tried to get any work on the outside for these boats, when we are in that rock business, for we keep them busy ourselves all the time.

Q. What did she cost?

A. What did she cost?

Q. Yes.

(Testimony of Daniel Kern.)

A. Well, I don't remember what she did cost. We bought her from the Government and put new boilers in her and rebuilt her and fixed her up.

Q. What was her name when you bought her?

A. "Manzanita."

Q. Was that the old "Manzanita"? Well, you can come awfully near [485] to stating what she was worth.

A. What she cost and what she is worth is two different things.

Q. What?

A. What a boat might cost and what she might be worth is two different things. I might buy a boat on the market *her* for ten thousand dollars and she might be worth fifty thousand.

Q. You don't know what you paid for her?

A. Yes, we know what we paid for her.

Q. Then you know what she was worth then, do you?

A. No, I don't know what she was worth.

Q. Well, would you know what a boat like the "Manzanita" would have cost at that time?

A. A boat like the "Manzanita" at that time would have cost—

Mr. WOOD.—You mean to build her?

A. (Continuing.) Cost about \$125,000.

Q. And you figure that—then do you figure that—

A. I don't figure it. You see I haven't been figuring at all.

Q. Well, the "Manzanita" at your estimate would have cost about \$125,000?

(Testimony of Daniel Kern.)

A. To build a boat of that size and capacity, I should think.

Q. And she was condemned by the Government before you bought her?

A. No, she wasn't condemned by the Government.

Q. Well, you bought her from the Government?

A. Yes, sir.

Q. You are sure she was not?

A. No, I don't know as she was condemned, but they put her up for sale and we bought her.

Q. You swear she wasn't condemned?

A. No; I won't swear she wasn't condemned. I don't know that [486] she was condemned, though. But this wasn't the same boat. We bought that boat from the Government; we rebuilt this boat and put new machinery and boilers in her and spent a lot of money on her.

Q. Now then, you may state what you paid for her.

A. What we paid for her at the time we bought her?

Q. Yes.

A. Well, I don't know exactly what they did pay for her; I think though about, somewheres around \$15,000; she had just been sunk and raised and we had to rebuild her and put her in shape.

COMMISSIONER.—Is that the same boat that was in collision with the port of Portland?

A. Yes; we bought her right after that.

Q. You bought her when she was in the water, under water?

(Testimony of Daniel Kern.)

A. Yes; what we paid for her had nothing to do with the value of that boat.

Q. I know it didn't; I want to get at something.

A. We had to put in new boilers in the boat and put in all kinds of new machinery.

Q. Well, at the rate of \$50.00 a day that is \$1500.00 a month, isn't it? A. Yes.

Q. And twelve months in the year would be \$18,000 a year; that is what you figure?

A. If she were employed every day she would be worth that much money. There is lots—there is boats now making three times every year what they cost, right now.

Q. That is the reason I asked what she was earning in 1909.

A. Well, it was a good demand for boats in 1909.

Q. Were these boats like the "Wallacut" and these other boats [487] cleaning up \$18,000?

A. I don't know what they were cleaning up. I know our own boats were busy. I don't know anything about the "Wallacut," what she was earning or anything about it.

Q. That is the question, however, your counsel asked you, what the boat could have earned; not whether you were busy or not. That is the reason I asked.

A. She was worth \$50.00 a day to us, because we paid \$50.00 a day to have that same work done, to other people, on more than one occasion.

Q. On occasions?

A. More than one occasion, I say.

(Testimony of Daniel Kern.)

Q. On occasions?

A. Yes, a stretch of two or three months at a time.

Q. I know, at different odd times.

A. When our own boats were not in running order, or something, we had to hire a boat. At the time I hired that "Traveler" we were putting new boilers in the "Sampson."

Q. In 1909, is it your intention to state to the Commissioner who is taking the testimony in this case that you paid \$50.00 a day, not to you but to an outside owner, each and every day?

A. Yes. If they wanted the boat that is what they would have to pay for it.

Q. I know, but was it wanted there any time?

A. I don't know what the market was for that boat at that time, that day.

Q. Only if they happened to charter it?

A. Yes, but we were paying that for that class of boat.

Q. When were using them?

A. Yes, when were using them. We had our own boats and didn't [488] have to hire a boat very often.

Q. How many boats did you have like the "Kern"?

A. We have four.

Q. And were they all occupied?

Mr. WOOD.—What do you mean, now or then?

Mr. REED.—Then; always then.

A. We had four, 1909, yes—no, we only had three in 1909.

(Testimony of Daniel Kern.)

Q. Were they all occupied in taking barges up and down the river?

A. Employed in our own work.

Q. I say, taking barges up and down?

A. Well, some of them were towing barges down to the mouth of the river.

Q. What?

A. We had one barge towing around Portland here, one boat. The rest of them were engaged in towing to the mouth of the river.

Q. What boat was engaged here in towing around?

A. A little boat called the "Triumph."

Q. Whose work did she do towing here

A. What is that?

Q. Whose work did she do on the Willamette, your own work? A. Why, yes.

Q. You didn't charter her or lease her?

A. No.

Q. In the work of raising the "Kern" who had charge of it? A. Mr. Knudsen.

Q. And were the men employed by him, the Columbia Contract Company's regular employees, or a special crew of wreckers and laborers?

A. Men that we picked up to do the work. [489]

Q. I meant, were they men whose special occupation is that sort of work?

A. Oh, there are no such men around this part of the country that make a specialty of raising boats.

Q. Under whose direct charge was the raising done? Whose charge? Who was the man that gave the orders, do this or do that—the policy?

(Testimony of Daniel Kern.)

A. Well, I told Mr. Knudsen to go down there and raise the boat and I suppose he gave the orders.

Q. Had he ever engaged in that sort of work before? A. I think so.

Mr. WOOD.—I will say for your information we will put Mr. Knudsen on and he will tell all about his experience.

A. I don't know what experience he had.

Redirect Examination.

Q. Just in that last connection, Mr. Kern, weren't Captain Crowe and Mr. Honeyman also down there during the raising?

A. Well, Captain Crowe was; I don't know about Mr. Honeyman being down there.

Q. And I don't know whether it is in the record. You might say who Captain Crowe was.

A. He was marine surveyor here at that time.

Q. What was he doing down there at the wreck?

A. He was down there to see about raising the boat. To see whether we were carrying it on right.

Mr. WOOD.—That is all, unless we are going to take up the bills. Of course, if you want him to identify each bill we will have to keep him here for a couple of days. You see he has signed every one of these checks.

Mr. REED.—I move that the testimony of the witness in [490] regard to the *per diem* value of the "Kern" be stricken out on the ground that it is incompetent, irrelevant and immaterial as testimony on which to found a claim for damages.

COMMISSIONER.—Your objection will be noted

(Testimony of Daniel Kern.)

in the record and same can be raised on objection to the report, so there is no use to pass upon it.

Witness excused. [491]

Testimony of Theodore Knudsen, for Libelant.

THEODORE KNUDSEN, a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. WOOD:

Will you state at length your experience as a wrecker and repairer of vessels?

A. Well, I have been at it thirty-three or four years, building and wrecking. I was on the Great Lakes for over thirty years. I raised the "Philip D. Armour" in the Detroit River and I raised the "Iron Cliff" on Hyde Park reef outside of Chicago. I raised two boats, the "Marlowe" and the "Gordon" in Lake Michigan; the "Marlowe" and the "Gordon" is the names of the two boats, and then I was assistant wrecker on a good many other boats on the Soo and on Lake Erie and the St. Clair River, a number of jobs. And on the building I done quite a little of that, built quite a few boats. Worked at it all my life.

Q. Where?

A. On the Great Lakes, worked for the American Ship Building Company eight or nine years; then I worked for Manitoulin Drydock Company. I was superintendent for them and associated with them, interested with them. Then I went to Chicago for

(Testimony of Theodore Knudsen.)

about six years and on the coast there I superintended the building of the "Chinook."

Q. That is on this coast? A. Yes, sir.

Q. The dredge "Chinook" down at the mouth of the river, United States Government dredge?

A. Yes, when they cut her down; cut one deck off her. And a number of jobs I worked for Mr. Kern of the Columbia Contract [492] Company, for practically a year, doing boat work all the time, and I done some wrecking on the coast too.

Q. What was it?

A. The "Oshkosh"; she was out in the breakers upside down. I took the machinery out of her.

Q. Out in the breakers off the Columbia?

A. Yes; right in the breakers eighteen hundred feet from shore. And I done a lot of small matters; wrecked a barge down in the Siuslaw and raised the "Daniel Kern" on the Columbia River.

Q. At the time she was sunk in collision with the "Elder"? A. Yes, sir.

Q. What are you doing now?

A. I am now working for the Peninsula Shipbuilding Company.

Q. What capacity?

A. Superintendent for them; superintendent, that is my title, I guess.

Q. Coming more specifically now to this "Daniel Kern" which you raised down near Waterford, how did she lie in the river?

A. Well, I don't know exactly what course she was lying, but she was lying—her bow was lying towards

(Testimony of Theodore Knudsen.)

the Washington shore, pretty near directly across the channel; just about diagonally the channel or square across, I mean, of the channel.

Q. About how deep was the water she was in?

A. Well, I measured from the bottom of the keel, high water I judged it about ninety feet, but I think from—she was in a hole, you understand, but right from there was probably about sixty-five feet, something like that; that is, the bottom surrounding her.

Q. What do you mean by hole there? [493]

A. Appeared to be a hole where she was setting, just kind of on the bottom.

Q. Do you mean she made that hole herself?

A. I don't know whether she made it herself or not. Of course she might have made some of it. Apparently there was a trench through the river, because was a deep hole ahead of her and also astern of her.

Q. What current was there in the river?

A. Well, at one time there was an awful current. Four men couldn't pull against it with four oars. We had to pull out along the shore and then shoot across to get on to it. Had nine anchors out, and by gosh, couldn't hardly hold the barges.

Q. Now, you mentioned the barges, and that brings us to the point of describing the method you adopted to raise her. Will you tell about that?

A. Well, when we first went down we had a small barge with us; had two big ones and one of the big ones was laying at Stella; we couldn't hold her in with one of them, so took one of the big barges and a

(Testimony of Theodore Knudsen.)

little one down with us. So we anchored the big one upstream a ways from the wreck and slacked a little down, and got a cable slipped along her stern and held her there, held the cable there until we got two barges placed, one on each side. Got that down and fastened the cable on the big barges and sunk them down.

Q. How?

A. We had gates in the side of them, close to the water and inside, you know. We put holes through the side, you see.

Q. Side of the barges?

A. Yes, and put slides on which worked in rubber gaskets, [494] and raised them up and down; when we wanted to sink, we would leave them up and the water would run in the hold; if we wanted to raise her, shut the gates down and let the water out.

Q. Was a big valve?

A. Yes, I presume about a foot square, the hole was, because it takes quite a time to sink the big barges; takes quite a bunch of water. Of course when we got them sunk down a way, were pretty taut; had donkeys and boilers. We also had big pumps aboard, and of course at low tide we made them fast, you understand, to the barges, and set our pumps to work, and of course the tide, as well as lifting by the buoyancy of the barges, lifted the astern off the bottom, and of course we could sweep in more cables.

Q. Then as you raised the "Kern," you would slip in more cables under the keel.

(Testimony of Theodore Knudsen.)

A. Yes, and the more we got in the more to took the strain on them, kept even strain on them as far as we could until we got all under.

Q. How many did you get under her?

A. I think we had eleven at one time.

Q. How were those cables fastened to the barges?

A. We had fastened to the barges different ways. We put chains under her. Of course, the cables would strip often by boats coming by. The "Hassalo" and the "Harvest Queen" came by and made quite a surf and we couldn't keep down and would slip the cables. Sometimes more strain on one than another and of course the one with the most strain would snap, and one snap would cause another; so we put chains on them. Of course there is some give to a chain where none at all to a cable, and we had to put chains under the same way. [495]

Q. But you haven't yet told, I think, how these cables and chains were fastened to the barges?

A. In the first place, we had a barge along on each side like that and of course I figured out where the house of the ship was.

Q. The ship was all under water?

A. On the bottom; then I went to the Benson Logging Company and got some long logs; 120 feet was the shortest we had; from 120 feet up; and placed them across the barges before and aft the house and lashed them down to the barges. That kept the barges from tipping in; then got some square timbers and cut a hole through them.

Q. Through the timbers?

(Testimony of Theodore Knudsen.)

A. Through the timbers, yes, to place the chains through, you see. We had two timbers, one below and one above, then we had square irons bent on like a horseshoe, and we had two of them for each chain. You see the chains coming up through here through the bottom timber and to the top timber. You see we had a jack between the two timbers. You understand; and sometimes had to put cross timbers and jacks on it so as to lift the barges. We could put four jacks in there, but that was not enough; sometimes had to put eight in and put another timber in there; we go through the next timber; for instance, we put that stern higher, put it in across on top; that held that chain, and we put the screw on if we want to fleet; then when the screws were all out we had a chance to shorten up again, get a new hold; then we put our hand down below and we held the chains so they couldn't slacken off until we got the timbers down and got a new hold on top and went ahead again. [496]

Q. Then these two big square timbers, you mean, operate sort of like a hinge at one end. You would raise the upper timber and lift in that way with jack-screws?

A. That's the idea. We went to work and had them, these long timbers, this way across the barge, and the other end was lashed down there together.

Q. The other ends of the two timbers then were lashed together on the side of the barge opposite the wreck?

A. Yes, sir; on the outboard side and lashed to the

(Testimony of Theodore Knudsen.)

barge so as to allow the top timber to work up and down in that fashion. We had four timbers for each chain, two for each side, making four. I think the hoisting we had nine chains, if I am not mistaken.

Q. And as you raised the timber up with jack-screws as high as you could, then you would slip something under the top timber, or between the two timbers and take a new hold on the jack-screw?

A. That's the idea exactly. That piece of iron I spoke of we had bent, not iron, was tool steel so it would not sweat, good and hard. We had that and slipped over the chains.

Q. It was the same principle as when you pry anything up with a lever and after you lift so high you put a block under to hold it and take a new hold with the lever?

A. Practically the idea, yes; practically the idea all the way through.

Q. I show you a photograph, Mr. Knudsen, and ask you to state what it is?

A. That shows it, right there it is. You can see the levers on top. [497]

Q. Is that the "Kern" and barges?

A. Yes, that is the "Kern."

Q. After she was lifted out of the water?

A. Well, she was up then, you know, ready to go in drydock at that time. There is the timbers I mentioned, you know, that go across. Them long logs there are timbers, going across.

Q. Those long logs are the ones you put there to keep the barges from tipping towards the wreck as

(Testimony of Theodore Knudsen.)

she lifted? A. Yes, sir.

Q. You were afraid the weight of the wreck without those logs might tip the barge in?

A. It would tip. You see the buoyancy was weak; they are tender; they go over easy.

Q. And the square timbers with the big chain around them are the ones you have been describing?

A. Yes, sir.

Mr. WOOD.—I offer the picture in evidence.

Marked Damage Exhibit "A."

Q. As you raised the "Kern" on the incoming tide, what did you do towards moving her ashore?

A. Well, after we got out of the hole—that took quite a while, we had—we kept on jacking, you know, would screw down on the jack-screws there, well, for pretty near a week I think before we got out of the hole, and after we got out of that deep hole of course she floated in. The water got shallower as we got towards shore. We picked up as high as we could and floated as high as we could and of course rested on the bottom and we stopped. [498]

Q. Then when the tide went out you would take a new hold? A. Just the same method.

Q. The barges would sink with the outgoing tide?

A. Just the same method all the way through.

Q. Did you have any trouble, Mr. Knudsen, about the timbers breaking there at first?

A. The big round timbers, yes, that held the barges together. I had to go and get more and reinforce them.

(Testimony of Theodore Knudsen.)

Q. What made them break, the extreme weight of the tug?

A. The heft of the boats made them break.

Q. What did the "Kern" have in her, if anything, to increase her ordinary normal weight?

A. She had a bunch of rock and dirt, you know, gathered from the bottom.

Q. What was the rock? How did the rock get there?

A. Well, they use the rock, you know, to keep the wheel in the water.

Q. In other words, it was ballast?

A. Ballast, yes.

Q. This dirt you speak of, how did that get in?

A. Her hatches being open and the doors out of the house floated in at the bottom.

Q. Silt from the river washed in?

A. Yes, always does that in all wrecks.

Q. Did that increase the difficulties of raising her?

A. Made her heavier.

Q. Did you work on every incoming tide?

A. I worked on the incoming and outgoing, both.

Q. What I mean particularly is, did you have to have your crew on hand to avail yourself and take advantage of every tide? [499]

A. Yes, sir; I had to have practically speaking, two crews; had to have an engineer's crew when the tide came in and the other crew when the tide went out, operating the pumps and boilers, etc.

Q. Is that what you meant by engineer's crew?

A. Yes, sir.

(Testimony of Theodore Knudsen.)

Q. Why did you have to have the other crew particularly?

A. Have to handle the chains and do the stowing up of timbers.

Q. You spoke of cutting these holes in the barges to make the water-gates, flood-gates, whatever you call them. Did you have to cut any holes through the main timbers used across the barges?

A. Yes, I just told you had to cut holes to lash them down to the keelson. Didn't I explain that?

Q. I don't think you have.

A. Let me see the picture and I can explain it better. If you notice close you can see some lashings coming around there in the barges; for instance, one lashing there and one lashing might be changed. The chain takes it up. You can see a little. That lashing goes right down through her deck and through her shaft strakes and comes down and gets hold of her keelson down below and of course we had to cut them holes.

Q. And you had to cut holes through the decks?

A. Yes, through the decks.

Q. In order to lash these timbers to her keelson?

A. And keep from sliding had to go on the keelson.

Q. What was the necessity of lashing to the keelson?

A. What good would it be if you didn't lash them. Might tear the whole deck and all out.

Q. It was a necessary thing to do. [500]

A. Absolutely. On the other side of these long timbers cut holes through the deck to lash the timbers down.

(Testimony of Theodore Knudsen.)

Q. In the same way?

A. Don't go through keelson there, because the levers were short. It was not necessary. We just went through the beams there, around the beams, rather; not through the beams, but through the deck and around the beams.

Q. I show you another photograph and ask you if that represents the "Kern" lifted between the two barges?

A. Yes, sir; that is her. Her name is on there, too; you can't miss it.

Q. Barge 17 is on there, too, I believe?

A. Yes, there is the tug "Wentworth," the barge and the "Kern" and the whole thing. The little barge, I think, is there too. I think the whole thing is there. I think that is the little barge.

Q. The littel barge is in the lower left-hand corner; just the corner of the barge showing?

A. That is all; and there is one of her boats. There is the "Wentworth"; there is the "Wash-tucna."

Q. The "Wentworth" is on the left?

A. Part of the house; we had her for a tender.

Photograph offered in evidence and marked Damage Exhibit "B."

Mr. REED.—You don't know who took them?

Mr. WOOD.—Yes, a man by the name of Spaulding.

Q. What is that photograph?

A. That is the same thing. You can see the lashing plain there.

(Testimony of Theodore Knudsen.)

Photograph offered in evidence and marked Damage Exhibit "C." [501]

Q. Mr. Knudsen, you have mentioned the "Wentworth"; what was she there for?

A. Well, she was there to help us place anchors, move anchors, give us a pull if any was required, to get supplies and fuel for us.

Q. Did you use her to pull you towards shore after you got floated? A. Yes, sir.

Q. What was the "Wentworth"? Describe what kind of a boat she was.

A. Well, she is used for towing logs on the river; she is a stern wheeler.

Q. Is she one of these ordinary Willamette-Columbia stern wheel river boats?

A. That is what she is, yes.

Q. Could you have done the work there, Mr. Knudsen, without the "Wentworth" or some boat like her?

A. No, had to have a tug of some kind and sometimes had two tugs there.

Q. What was the other tug?

A. The other one was the "Sampson." We struck her occasionally and she gave us a pull.

Q. The "Sampson"?

A. She was towing rock barges up and down and whenever we needed a pull we stopped her to give us a pull.

Q. I show you Damage Exhibit "B." That one you mentioned having "Daniel Kern" visible written on the stern. In that photograph the stern appears to be twisted and dropped down. I now ask you whether

(Testimony of Theodore Knudsen.)

or not that was a fact; whether the stern was dropped down?

A. Yes; that shows right in there; yes, it shows plain. The [502] cable goes right on her stern with tackle to her main mast. Her stern now was just about ready to fall off altogether, when I got it where I could see it, and I didn't want to lose—well, several things; the shaft, for instance, and several things, and also I didn't know but the stern post might be included in that loose part, so I got a cable and put it around it and put to the main mast and stayed to main mast, foremast, and down to the stem. Took it to a winch and made it taut, made it hang there.

Q. You mean by that slipping a cable underneath the stern; the vessel was so cut in two there was danger of losing the stern?

A. That was my view of it; it might have hung on, but I thought better to do it. I took precautions so wouldn't lose it.

Q. Can you describe in a general way the damage that was done to the "Kern"?

A. Yes; she was cut in practically—she was cut clear to her keelson, or to her keel, would be the same thing, you know, only one is above the other.

Q. On which side?

A. Starboard side; just about abreast of her truss bearing. Truss bearing is between the intermediate shaft and—first comes the crank shaft, then the intermediate shaft, then the truss shaft, then the tail shaft.

(Testimony of Theodore Knudsen.)

Q. That in effect would be on her starboard quarter, wouldn't it?

A. Be a little forward of her quarter; just about the beginning of the quarter.

Q. Being cut in two like that, what damage was done to her machinery? [503]

A. Everything in front of it was carried away. I forget—some beams on that side carried away and broke and, if I am not mistaken, a coupling was broke and the tail shaft sprung; that was sprung bad. We had an awful time getting it straight.

Q. In this photograph A, her house and deck and bulwarks, bitts and everything seems to be destroyed there?

A. Yes; they was all carried away; we had to go to work and tear the planking off the outside and the ceiling inside quite a ways forward; tear the coal bunkers out so we could get a chance to splice in.

Q. You are now talking of the repairs?

A. Yes, sir.

Q. How many days if you remember, and if you don't, say so, were you engaged in raising her, do you know?

A. Well, no, I don't remember exactly; I couldn't tell you for sure.

Q. Have you any record you could look up and find that out?

A. No, I turned all the records over to Mr. Kern. I think it was something like six weeks, if I ain't mistaken. Practically speaking, six weeks; might have been seven.

(Testimony of Theodore Knudsen.)

Q. Well, we will have to get some record of that that will probably be better than your memory. Were you in charge of the repairs afterwards?

A. I was, sir; yes, sir.

Q. You might state, after you got the vessel raised where you took her for repairs and how you got her there.

A. Well, we—I forget just now; I don't remember exactly what day it was, what day of the week, I mean; but when we left her mooring and went as far as Stella I got off the boat and took [504] a small boat and went into Stella. We passed Stella. I called up Mr. Kern, where shall I land her? He says, "Land at Willamette Iron Works." So the following day we got to Willamette Iron Works; took us all that day, the next day and part of the next day.

Q. Before you get too far away, how did you get her from the river to the Willamette Iron Works?

A. The "Wentworth" hauled us up.

Q. Hauling her between two barges?

A. Yes; that photograph shows at Willamette Iron Works.

Q. The "Wentworth" towed you to the Willamette Iron Works? Then what did you do?

A. Had to wait a few days before we could dry-dock. I think the drydock was occupied, if I ain't mistaken; then we had to—we kept the pumps going meantime night and day all the time. Then we slacked away her chains, had a tug stand by, and pulled out the cradle, as I call it you know, and shoved her into drydock.

(Testimony of Theodore Knudsen.)

Q. Which drydock did you put her on, the Oregon drydock? A. Oregon drydock, yes, sir.

Q. Down near the Willamette Iron & Steel Works?

A. Yes.

Q. And I believe you said then that you had general superintendence of the repairs afterwards?

A. Yes, sir.

Q. Before towing her up from Waterford did you have to bulkhead her?

A. Oh, yes; we had to bulkhead her before we could get the water out of her hold; before we could hold it.

Q. Where did you put the bulkhead? [505]

A. We put the bulkhead right forward of the cut.

Q. And then you pumped the water out forward of the bulkhead?

A. Yes; and the after part was always full. Of course, we had to get the rocks out of her; they had a diver there, you know.

Q. Get the rock ballast out of her? A. Yes, sir.

Q. And also this dirt and silt that you speak of?

A. Well, we didn't get all that out; we just got the rock out of her enough to get the bulkhead down and taking out, working forward; she was full all the way aft; also used diver to get canvas on; had to nail canvas on to keep the water out. The bulkhead we couldn't get tight, you know, down below.

Q. I don't know as I asked you this. Where was she sunk? How far was it from shore, do you know?

A. Well, I never measured it; I couldn't say for sure, but she was right straight in the channel; I re-

(Testimony of Theodore Knudsen.)

member that. The channel there is probably about three hundred feet.

Q. You said across the channel; you don't mean straight up and down the channel; you mean directly in the channel?

A. In the channel, I mean; right across the channel. I don't know, I couldn't say—

Q. Now, returning to the repairs that you superintended, can you describe in a general way what they were, what they had to do for her?

A. Yes, I guess I can.

Q. I wish you would.

A. The first thing we had to do was to clear away all the rubbish, such as rocks and all the sediment in the bottom [506] of her; tear away all the broken wood and practically loosen her up. She had a twist in her, you know, about a foot and a half; her stern was leaning to port and her stem was starboard. Of course the stem might have been plumb, but nevertheless her stern was laying over a foot and a half, and I had to put hydraulic jacks on to her so as to get her back into line again. Well, we had to loosen up the fastenings quite a ways forward.

Q. So you could straighten her?

A. Yes; and of course after the fastenings was loosened up she would come out and we would re-fasten again. Then we had to break butts on the planking in the ceiling, and clamps and shelves and the whole thing, decks, and go forward far enough to allow a proper hold to the old, you know.

Q. What sort of wood was she made of?

(Testimony of Theodore Knudsen.)

A. She was built out of oak, white oak.

Q. And in repairing her did you use oak in every instance?

A. No, we didn't; we used oak frames and we used fir for her ceiling and her planking.

Q. Is fir as good as oak in building a vessel?

A. No, it isn't considered as good as oak.

Q. Why didn't you repair her with oak?

A. We couldn't get timber long enough to make proper connections.

Q. What would be the comparison between the cost of white oak and fir?

A. Well, Eastern white oak at that time, I presume was worth about \$120.00 or \$125.00 a thousand, and fir probably worth about \$20.00 or \$25.00.

Q. So if you had insisted on repairing her with the same material that she had been built of, it would have cost you \$125.00 a [507] thousand as against \$20.00 a thousand?

A. Yes; practically speaking. Say, \$25.00; that is allowing fair.

Q. You spoke of loosening her up forward to straighten her, and breaking butts, I think you said, of the ceiling and sides. Were you able to use the starboard quarter and patch it up again or did you rebuild the stern?

A. No, we had to rebuild the whole thing. Had to rebuild the port quarter, you mean?

Q. No, the starboard quarter.

A. Oh, that was all gone; all smashed up.

Q. And the port quarter you entirely rebuilt; then

(Testimony of Theodore Knudsen.)

you rebuilt the whole stern of the vessel, did you?

A. Yes; built new starboard quarter and rebuilt the port quarter.

Q. Do you know about the damage to the machinery and what was done to repair it, or does Mr. Honeyman know that only?

A. Well, I had quite a little to do with repairing the hull and I didn't pay very much attention to the machinery with the exception of getting the old shaft out and replacing with new one.

Q. Well, I will show that by Mr. Honeyman in addition, but tell as much as you do know about the damage to the machinery and the repairs made to it.

A. Well, of course, all the piping, you know, around there was busted and broken. I think one pump was all gone, smashed all to pieces, and of course in bending the stanchion her main engines was twisted on the foundation and had to be lined up again. As a matter of fact, the whole thing had to be overhauled all the way through her, all the piping. Her covering of the piping was all gone all over.

Q. You mean the asbestos covering? [508]

A. Yes; also on her boilers; they were gone. The asbestos, you know, on it. You see in getting around her we had to handle some of that stuff kind of—you couldn't work with kid gloves, you know.

Q. Was there any silt or mud in the machinery that had to be cleaned out?

A. Oh, yes, everything that mud could get into.

Q. It was there? A. Oh, yes, it was there.

(Testimony of Theodore Knudsen.)

Q. I believe the "Kern" before she was wrecked had a cabin on her? A. Yes, sir.

Q. Was that replaced?

A. Well, you know the after part was not replaced. We just repaired the part we could fix up and the other part we left out.

Q. Mr. Knudsen, did you know the "Kern" before she was wrecked? A. Yes, sir; I did.

Q. I show you a photograph and ask you if that middle boat there is the "Kern"?

A. I can pick her out for you. Yes, sir, that is the "Daniel Kern."

Q. I notice in that photograph she has a cabin down all the way aft?

A. Yes, and has a house on top there, too; and that main mast there was torn out, you know, during the wreck there, which was not missing before. The main mast was carried away altogether and her foremast was a piece broke off.

Photograph offered in evidence and marked Damage Exhibit "D."

Mr. REED.—Is that photograph intended to convey the appearance of the "Kern" at the time of this accident?

Mr. WOOD.—Before the accident. [509]

Mr. REED.—I mean before.

Mr. CAMPBELL.—Here is one introduced in evidence on the original hearing. You can see the identification, Libelant's Exhibit 1 in the first hearing.

Q. I show you Libelant's Exhibit 1, Mr. Knudsen,

(Testimony of Theodore Knudsen.)

and ask you to indicate how much of that cabin was replaced when you repaired the boat?

A. Well, there wasn't—how much was lost, you mean?

Q. All right. How much was not replaced?

A. Well, now, she was cut off, I think, about here, about like that; about by the main mast. From there on after it was gone and I left it off; never put it on any more. The rest of the parts were fixed up, you know, repaired it. Put on new bulkheads where we could and repaired the old ones, etc. New windows, of course, all over.

Cross-examination.

Questions by Mr. REED:

The repairs in the way of woodwork consisted of replacing the starboard quarter and the use of the port quarter, repairing the port quarter?

A. Yes; we used the port quarter all we could, you know.

Q. And had to replace the starboard quarter from the main mast aft?

A. Yes, we had to go to break the butts, splice in.

Q. What took out that main mast?

A. I think the heft; the current was so strong when we were laying right above her that the barges strike against her.

Q. Taken out when she was on the bottom?

A. It was done in the raising of her.

Q. Now, you mentioned something about the shaft.

[510]

A. Yes, her tail shaft.

(Testimony of Theodore Knudsen.)

Q. What happened to it?

A. When we took it out it was awful crooked; awful time getting it out.

Q. Is that so? A. Bent, yes.

Q. Was there an incision in the boat, in the "Kern"? She was hit in the starboard quarter there, wasn't she? A. Yes.

Q. And the bow of the "Elder" must have struck then, or bent some way the shaft?

A. Well, she hit just about by the truss shaft, and if I ain't mistaken, the coupling was broke. You see, two couplings from between the truss shaft and the intermediate and one between the tail shaft. I don't know whether hit there, but might have. She broke the coupling and just shoved over. Something might have got between the "Elder" and the shaft and shoved it plumb over, and we had quite a time getting it out.

Q. Do you know how old the engines were?

A. No.

Q. Do you know how long the "Manzanita" had been in commission?

A. Not to be sure; approximately I do, but not to be sure.

Q. What was it, approximately?

A. About thirty years, I presume; twenty-six years.

Q. You don't know whether the engines have been renewed in the "Kern" or not, then. She was in the water some time before that, wasn't she? You don't know whether the same engines or not?

(Testimony of Theodore Knudsen.)

A. You mean renewed before the collision or after the collision, which? [511]

Q. Before this collision; before she got into trouble with the port of Portland dredge.

A. I don't know anything about that; I couldn't tell you; I don't know. I know she had new boilers, but the engines I don't know a thing about.

Q. How many boilers? A. Well, boiler.

Q. Just one?

A. Well, I think she had a donkey boiler; I don't know for sure whether she did or not. I couldn't say for sure, but I think she did.

Q. Did you use one crew when the tide went in and one when it went out, on the work? A. Yes, sir.

Q. I don't understand that.

A. Well, what do you mean you don't understand?

Q. I don't see why you used two crews.

A. You wouldn't expect a man to work twenty-four hours a day.

Q. Oh, different shifts, was it? Just different shifts? A. Yes.

Q. Wasn't anything to do with the particularity of the work? A. Yes, it was.

Q. Please explain again. I don't understand the matter definitely.

A. For instance, when pumping we had men that understood pumps and understood firing the boilers, etc. We couldn't put in common laborers on that class of job. It requires quite a few laborers for this, getting wood for it, and seeing the chains were all proper, taut, equal chains on them; see the anchors

(Testimony of Theodore Knudsen.)

were out proper, and that was one shift.

Q. That was the engineer's shift? [512]

A. Yes, the next shift was the crew that changed the chains; that is, fleet them, they call it.

Q. Now, then, can you estimate how much in the way of board measure you put in in place of oak?

A. Absolutely no, I could not.

Q. Really didn't amount to much, did it, anyway?

A. Was quite a bunch.

Q. How much?

A. I couldn't tell offhand. It is impossible to tell you; it is impossible; I don't remember; a long time ago.

Q. How long was it?

A. I don't know how long. I guess about 160-165, something like that.

Q. Then there was a matter—how far would it be from the main mast aft?

A. Have to go further than the main mast, you know.

Q. Not far, though?

A. Yes, have to go forward abreast of the boiler. I went forward with some of them as far as her fore hatch.

Q. Was more than the quarter you worked on?

A. Sure; the underwriters compel us to go to get proper butts.

Q. I was getting information. I know that you put in new starboard quarter, but if you went clear up as near forward as that it would make a little more.

(Testimony of Theodore Knudsen.)

A. Would have to go forward; couldn't butt her square; that wouldn't be policy; have to seesaw fore and back.

Q. You don't know how much it was?

A. How many feet of lumber?

Q. Yes. [513]

A. No, I couldn't tell; I guess the record would show that. I couldn't tell you offhand; no.

Q. At that time were you in the regular employ of the Columbia Contract Company? A. Yes, sir.

Q. And as I understand it, they put you down there at this particular time to do this work under their own—without contracting it; they just did it through you? A. Yes, sir.

Q. There were no bids taken or effort made to contract it?

A. No, sir; not that I know of. Of course, that is something I don't know a thing about. I got my orders to proceed and raise it, which I did.

Q. Before that where had you been employed?

A. I was at Astoria at the time of the accident.

Q. For them? A. Yes, sir.

Redirect Examination.

Q. Mr. Knudsen, you said just now you were in the regular employ of the Columbia Contract Company. I don't know whether you mean you were regularly employed by them for this job or whether you were one of their regular employees year in and year out?

A. Well, sir, I went to work for Mr. Kern in March of the same year. I rebuilt a boat they called the

(Testimony of Theodore Knudsen.)

"Minnie Kelton," No. 17, I think it was. She was a wreck; put a new stern in her, part of a new bow, and previous to that I had put a new boiler in that same boat, the "Daniel Kern"; and after I got through with the "Daniel Kern" he had another boat he wanted repaired. I was called on her and we done that job and she was in Astoria at the time of the collision between the "Daniel Kern" and the "Elder."

Q. When you speak of being in the regular employ you mean you [514] were hired to do different repair jobs on different vessels of theirs? But, as I understand it you were not one of their regular, long time employees?

A. No, no, from time to time.

Recross-examination.

Q. When was the boiler put in the "Kern"?

A. Well, I went to work there in March; were put in that spring, probably in April or the first of May, I ain't quite positive; something similar to that. Quite a little overhauling she had besides that. Had to tear her house off to get them in.

Q. What other repairs were done at that time?

A. Just general repairs, you know.

Q. What?

A. Well, I couldn't mention right now what it was; for instance, had to take part of her house out to get the boilers in, and had to put a new house again on that part we took out.

Q. Were they working the engines then?

(Testimony of Theodore Knudsen.)

A. Oh, working them every year.

Q. At that time?

A. Oh, yes, the engineers was all there right along.

Q. I now ask you if the photographs here showing the destruction of the house here where your pilings crossed to keep the scows from tipping, was that done by the collision or removed to let the piles on?

A. No, that was done in the collision, sir, because you can see there we are about three feet, now, from the house; we never got high enough for that. From there aft, you know, it was just a roof, you understand, upper deck like that, stanchions all around.

Witness excused. [515]

Testimony of Daniel Kern, for Libelant (Recalled).

DANIEL KERN, recalled on behalf of libelant.

Direct Examination.

Questions by Mr. WOOD:

Mr. Kern, I hand you a voucher of the Columbia Contract Company, No. 24,454, and ask you to state if that is a voucher check of your company?

A. Yes, sir.

Q. And what is the bill attached to it?

A. The bill is for material used in the raising of the steamer "Kern."

Mr. WOOD.—I offer it in evidence and will ask a question or two about it later.

Mr. REED.—I object to it as incompetent, irrelevant and immaterial, not appearing on its face as having to do with the "Kern" and in fact appearing on its face as shipped to the quarry and not anything

(Testimony of Daniel Kern.)

to do with the "Kern," the "Kern" having been testified to as brought from the Columbia River to the Willamette Iron & Steel Company's Oregon dry-dock.

Mr. CAMPBELL.—That has to do with the raising of the "Kern."

Mr. REED.—Just the same I object to it because that went to the quarry and didn't go down there and it can be explained.

A. I can explain why it went to the quarry, 24,454.

Q. Mr. Kern, this voucher No. 24,454, is the regular voucher number that you use in your system that you explained before? A. Yes, sir.

Q. Is that your signature on the check?

A. Yes, sir.

Q. And is that voucher in payment of that bill?

A. Yes, sir.

Q. Which is attached to it? A. Yes, sir. [516]

Q. Now, you said you would explain why it went to the quarry.

A. Was shipped to the quarry and taken by our boats from the quarry down to this wreck, where they were raising this boat. We sent lots of freight down that way and wasn't no charge made for it.

Offered in evidence and marked Damage Exhibit 24,454.

Q. I show, Mr. Kern, Columbia Contract voucher No. 24,640 and with it a check bearing the same number, and will ask you to state whether that is your signature to the check? A. Yes, sir.

Q. And what the check is for.

(Testimony of Daniel Kern.)

A. Check is for labor.

Q. In connection with what?

A. Raising the steamer "Kern," \$48.00.

Offered in evidence and marked Damage Exhibit 24,640.

Q. I show you Columbia Contract voucher 24,648 with accompanying check bearing the same number.

Mr. REED.—Just a second. What was that first one?

A. This check is for labor.

Mr. REED.—What are these items?

Mr. WOOD.—These are in numerical order.

Q. I ask you whether that is your signature to the check and what that check is for?

A. That is my signature and the check is for labor, raising the steamer "Kern."

Offered in evidence and marked Damage Exhibit 24,648.

Mr. REED.—Can I cross-examine as they go in?
[517]

COMMISSIONER.—I think that is the orderly way to do. If you have any question about it, I think you should find out right then and there.

Mr. REED.—Did you make the annotation on the check as the check was drawn?

A. There when drawn, yes, on all of them.

Q. I show you a voucher, No. 24,654 with accompanying check bearing the same number, and ask you if that is your signature on that check?

A. Yes, sir.

Q. What was that check for?

(Testimony of Daniel Kern.)

A. Labor for raising the steamer "Kern."

Q. Was the check paid? A. Paid, yes.

Mr. REED.—In stating that it is on the "Kern" do you know of your own knowledge?

A. Well, I wouldn't pay it if it wasn't. I wouldn't have wrote that on there if it wasn't so. I made that check.

Mr. CAMPBELL.—You knew at that time?

A. I knew at that time that was correct. I don't know who Tom Dahl is now.

Q. I will ask you a general question covering all these checks. Mr. Kern, every one of these checks signed by you having memorandum on it like, "Raising Steamer 'Kern,' " or "Repair Steamer 'Kern,' " that memorandum was put on there by you at the time you wrote out the check, was it? A. Yes, sir.

Q. And it was put on there because, as president and general manager of this company, you had knowledge that was what the check was for?

A. Yes, every one of our checks shows what it was issued for. [518]

Q. So that although now you cannot remember any particular check, you can swear to it that at that time you knew that check was for that purpose?

A. Yes, sir.

Q. In other words, a record of past recollection?

Mr. REED.—How do you know that at the time you wrote this on there that this man Dahl was working on there?

A. Well, he had some evidence showing that he was working there.

(Testimony of Daniel Kern.)

Mr. REED.—What?

A. He had some evidence to show that he was working there.

Mr. REED.—You don't know what the evidence was?

A. Time check covering the time, they kept the time; Mr. Knudsen kept the time on the drydock, and Captain Copeland kept it on raising the boat.

Mr. REED.—The entry that was made here was made by you after checking with the payroll or time-book?

A. We always check up to figure up the time, to see it was figured out correct, and if correct we issue bank checks.

Q. In other words, these checks are all written up by you when time check is presented to you?

A. Numbered by me.

Offered in evidence and marked Damage Exhibit 24,654.

Q. I show you a voucher No. 24,657 with accompanying check, bearing the same number, and ask you if that is your signature? A. Yes, sir.

Q. And what was the check for?

A. Labor lifting—raising the “Kern”?

Q. Was the check paid? A. Yes, sir.

Offered in evidence and marked Damage Exhibit 24,657. [519]

Mr. REED.—Why don't you take all the labor and time checks up and offer them in a bunch?

Mr. WOOD.—I thought you wanted it done this way. I would be tickled to death to do it that way.

(Testimony of Daniel Kern.)

Mr. REED.—Witness can testify of his own knowledge to the amount.

Q. Mr. Kern, I show you voucher 24,659 with accompanying check and ask you first if that is your signature to the check and whether the check was paid? A. Yes, sir.

Q. Now, I call your attention to a memorandum in the left-hand corner of the check which is "Steamer 'Kern' wreck, \$30.00; watchman and deck," the check itself being for \$75.50, and ask you what your memorandum there means.

A. That watchman there at the dock; that means that there was \$30.00 that was paid to him; that was for labor while raising the boat and the balance was as watchman on the deck, it says.

Q. Do you mean there that you don't claim the total check as part of this collision damage or not?

A. No; that is all collision damage. That is watchman and deck-hand. We only claim \$30.00 for wrecking steamer "Kern." He was watchman and deck hand on the boat.

Q. In other words, in that check, although you paid seventy-five dollars and some cents—

A. Only thirty of it to be charged to the wreck.

Q. And is that a sample of what you did?

A. Yes, sir.

Q. In all cases where you wrote a check where part of it was chargeable to the wreck and part to other causes?

A. Yes, you will find a number of them like that.

(Testimony of Daniel Kern.)

Q. As you made payments then from time to time you carefully segregated anything that was not chargeable to this collision; is that right?

A. Yes, sir.

Offered in evidence and marked Damage Exhibit 24,659.

Q. Mr. Kern, I hand you vouchers with accompanying checks 24,658, 24,686, 24,687, 24,688, 24,690, 24,692, 24,693, 24,694, 24,695, 24,696, 24,697, 24,704, 24,705, 24,706, 24,707, 24,708, 24,709, 24,710, 24,711, 24,712 and 24,713 and will ask you to please examine them and state whether those are the repair checks similar to those you have previously described?

A. Here is check for \$80.00 and only \$30.00 of it charged to the wreck.

Q. The same as you described before? A. Yes.

Q. Any other instance of that careful segregation of these charges?

A. This man was paid \$80.00 and only \$30.00 charged to that account.

Mr. WOOD.—Now, I think that we can adjourn and get together on these matters and will be able to dispose of it promptly.

Whereupon proceedings herein were adjourned until to-morrow morning. [521]

Portland, Oregon, Tuesday, July 18, 1916.

10 A. M.

Testimony of Daniel Kern, for Libelant (Resumed).

DANIEL KERN resumes the stand.

Direct Examination Continued.

Questions by Mr. WOOD:

Mr. Kern, I show you a list and ask you what it is and whether it was made up in your presence?

A. It is a list of damage for raising the steamer "Kern."

Q. That is just the raising alone, isn't it?

A. Yes, sir.

Q. Without taking into account the repairs?

A. Yes, sir.

Q. Does that list contain a correct statement of the sums paid out in raising the steamer "Kern" which you can evidence by the vouchers and receipted bills? A. Yes, sir.

List offered in evidence and marked Damage Exhibit "E."

Q. I now hand you a bunch of vouchers and checks and receipted bills and will ask you whether those are the vouchers and checks and receipted bills to support this statement that I have just shown you?

A. They are.

Q. This list? A. Yes, sir.

COMMISSIONER.—Do the numbers on these vouchers agree with the numbers on the list?

Mr. WOOD.—They do.

Mr. REED.—Does that comprise all of the vouchers for just this one list?

(Testimony of Daniel Kern.)

Mr. WOOD.—I offer the vouchers and receipted bills and checks in connection with the list.

Mr. REED.—No objection will be made to this at this time, [522] the right being reserved, as I understand, to examine these and make objections.

Marked Damage Exhibit “F.”

Q. Mr. Kern, I hand you a list of damages in raising the “Kern,” which has been offered in evidence, and call your attention to items listed, “Use of barge ‘Washtucna,’ capacity 1600 tons dead weight; use of barge No. 17, capacity 1400 tons dead weight, each with two wrecking pumps and two steam boilers, also one hoisting engine, tackle, block wires and connections; also one scow barge from August 27 to October 29, 63 days at \$100.00, \$6300.00, and damage to ‘Washtucna,’ \$750.00, and damage to No. 17, \$300.00,” and I will ask you whether there are any receipted bills or checks for those three items?

A. Not for that amount.

Mr. WOOD.—And those items, Mr. Reed, I call your attention are put on the list separate from the total checks and receipted bills, etc. These items we will support by testimony already in and further testimony.

Q. Now, I show you another list marked “‘Kern’ Damages, Repairs, not including labor,” and ask you what that list is?

A. I think that is a list for supplies that went—different items that went into the repairs of the steamer “Kern” to the amount of \$10,066.42.

(Testimony of Daniel Kern.)

List offered in evidence and marked Damage Exhibit "G."

Q. Now, I hand you a bunch of vouchers and receipted bills and checks and ask you whether these are the vouchers and checks that correspond with the list I showed you?

A. Yes, sir; those are the vouchers and checks that correspond with the list. [523]

Q. The list was made up from the vouchers and bills in your presence, was it not? A. Yes, sir.

Offered in evidence and marked Damage Exhibit "H."

Mr. REED.—Subject to the same objection in regard to examination and objection.

Mr. WOOD.—Now, I have here a bunch of checks paid to the laborers in repairing the "Kern."

Q. Mr. Kern, did you and Mr. Campbell and I prepare a list of these vouchers from the vouchers?

A. Yes, sir.

Q. And check the list over with the vouchers?

A. Yes, sir.

Q. And that list shows what?

A. That shows the list of laborers in repairing.

Offered in evidence and marked Damage Exhibit "I."

Q. Are these the vouchers in connection with the last list? A. Yes, those are the ones.

Offered in evidence and marked Damage Exhibit "J."

Mr. REED.—Subject the same way to objection.

Q. These vouchers are what was paid laborers in

(Testimony of Daniel Kern.)

repairing the "Kern"?

A. Laborers and carpenters, all labor.

Cross-examination.

Questions by Mr. REED:

Mr. Kern, when did this collision occur?

A. Eighteenth of August, 1909. [524]

Q. And how long were they raising her?

A. Well, I don't remember.

Q. What? A. I think they were about—

Q. Your books show October 29th, from the 27th of August, about two months?

A. That is probably correct.

Q. I am not questioning that. Did they have any slips or accidents while they were doing this?

A. I think so.

Q. What? A. Sure.

Q. What were they?

A. Chains slipping and had to change the gears. First went down to raise the boat and found the lines they had—they couldn't raise the boat with them. They had to go back and get timbers and different chains and rigging and one thing and another.

Q. Who took the first down there?

A. Mr. Knudsen.

Q. And didn't he inspect it before he went down?

A. Yes, but it is pretty hard to tell about lifting a boat.

Q. How did he find the second time?

A. He found out the first gear he took wouldn't work.

Q. Couldn't the diver tell?

(Testimony of Daniel Kern.)

A. Didn't have any diver; diver could do nothing in that current and depth of that water.

Q. Too deep?

A. And boat in a hole; the conditions surrounding that collision and that wreck; that took the time.

Q. What conditions?

A. Current in the river. This boat lay crosswise in the river, [525] and the depth of the water and the weight of the boat. You see the same as lifting a steel boat, built of oak. She had several—I don't know—probably a hundred tons of stone in her for ballast, and she was full of mud; had to lift a good many hundred tons in raising that boat. That boat was all oak. It was done just as quick as possible. They worked night and day whenever the opportunity was right. Took advantage of the tides whether it be night or day.

Q. Did you change the method of working the "Kern" from the time you started?

A. What is that?

Q. Did you change the method of procedure after you started? A. No, just got stronger gear.

Q. They went down, did they, with the intention of raising her by floating her, chains underneath?

A. Yes.

Q. And carried that out to the end?

A. Yes; the only way it could be done, a boat that heavy.

Q. How long a time did the change of chains, for instance, and change of gear necessitate in the work?

A. I don't know; several days.

(Testimony of Daniel Kern.)

Q. More than once? A. Changing rigging?

Q. Yes.

A. I don't think we changed it more than once; we had to come up here and get timbers; saw heavier timbers than we had; different rigging.

Q. Mr. Knudsen could tell that, could he?

A. Yes, sir.

Q. Was there ever any photograph? You introduced a couple of [526] photographs showing a view of the "Kern" after she was raised, showing the point of contact where she was cut by the "Elder."

A. We have photographs showing her in drydock; that is all.

Q. That is the one directly astern, is it?

A. No, not directly in the stern, from the quarter.

Q. Was it taken inside the drydock so you would get a good look at it? A. Yes, sir.

Q. Was it in evidence?

Mr. CAMPBELL.—That was introduced in evidence in the original case.

Q. You have one at home, have you? A. Yes.

Q. A duplicate?

A. I don't know whether a duplicate of the one in there.

Q. Anyway suppose you bring it down if you can. I want to get a look at that to check up on the timber. Now, these totals that aggregate forty-three thousand dollars, I believe, are the raising and the repairs?

Mr. WOOD.—And the demurrage.

(Testimony of Daniel Kern.)

Mr. REED.—How much is that demurrage?

Mr. WOOD.—I couldn't tell you offhand.

Mr. CAMPBELL.—\$6,750.00.

Mr. REED.—That would be about thirty-five thousand and a little over for raising and repairs.

Q. Now, you gave a sum approximating fifteen thousand dollars for her when she was sunk before?

A. Oh, no; don't make any difference what we paid; when we bought her she was a wreck. We rebuilt her, put new machinery in her; that has nothing to do with the value of that boat at the time she was sunk. [527]

Q. She was a wreck when you got her?

A. Yes, sir.

Q. For a sum approximating \$13,500, wasn't it?

A. I don't remember what it was; something, thirteen thousand or fifteen thousand; something over thirteen thousand. I don't remember what it was.

Q. Then you rebuilt her? A. Yes, sir.

Q. Where? A. Here in Portland.

Q. What did it cost to rebuild her?

A. I don't know now just what it did cost.

Q. Can you learn what it cost?

A. Probably can learn from the books; I don't know.

Q. You don't know?

A. I suppose I can find out.

Q. Suppose you do find out and tell us what was added to that fifteen thousand dollars when you rebuilt her.

A. You are objecting to the amount of these bills

(Testimony of Daniel Kern.)

now; we gave your company an opportunity to raise this boat; they didn't do it. They wrote us a letter saying they disclaimed any liability.

Q. Who did the rebuilding of the "Manzanita" when she was rebuilt? A. We did.

Q. Here in Portland? A. Yes, sir.

Q. Where, what yard? A. In Portland.

Q. I know, but down at the Willamette Iron Works? A. No.

Q. Supple's yard?

A. No, no yard; our own dock. [528]

Q. She was hit by the port of Portland's dredge, wasn't she? A. I don't know.

Q. I mean, that was the cause of her being in the water when you bought her, wasn't it?

A. I don't know.

Q. Do you know what the damage consisted of at that time, to her?

A. No, I don't; I was sick at the time; in bed for about six months and Mr. Day done the repairing on that boat.

Q. Well, then, as far as your testimony goes, that boat cost you \$13,500?

A. No; it cost a whole lot more money than that. We put in two new boilers in her.

Q. How much did they cost?

A. They cost several thousand dollars; I couldn't tell you offhand.

Q. Then in answer to my question as to how much money you put in to replace this boat you bought for \$13,500, your answer is, I don't know.

(Testimony of Daniel Kern.)

Mr. WOOD.—He hasn't said he bought for \$13,500.

A. I haven't said anything about the boat costing us \$13,500, \$700.00 or any other amount. I didn't buy the boat myself. Mr. Charles Adams down at the Security Savings Bank bought that boat when sold by the Government.

Q. The claimant in this case is the Columbia Contract Company, is it? A. I believe so.

Q. What is your connection with it?

A. I am president and manager. At that time that transaction was going on I was taken sick in the month of August and I never got out until the month of February. [529]

Q. That was in what year? A. 1906 and '07.

Q. 1906 you bought her, then, did you?

A. Yes, sir.

Q. The Columbia Contract Company bought the "Manzanita"?

A. 1906, at the time I was sick.

Q. In August?

A. I don't know whether in August or what time.

Q. You have said, though, I believe—in order to be straight, all I want is to be sure of my ground so I won't be accused of misrepresenting—you paid approximately thirteen thousand?

A. Yes, when she was a wreck.

Q. And you are unable to state—

A. I don't know what it has cost up to the present time.

Q. You are not prepared to state what it cost you

(Testimony of Daniel Kern.)

to repair and fix her? A. Cost a lot of money.

Q. You are not prepared to say?

A. No, not prepared to say.

Q. Nevertheless you ask thirty thousand dollars for damage to rebuild now?

A. All we ask is the money to make us good. We haven't charged nowhere near what we should charge in connection with that boat. The boat is not what she was at the time she was wrecked (taking photographs). Here is the boat at the time she was wrecked and here she is now. Two thousand dollar cabin on there, never replaced. We are not charging anything for the difference between oak and fir wood, either, for which there should be a difference.

Q. You used that boat entirely as a towboat, didn't you?

A. Yes; that is what we use all our boats for.

Q. And what value is the cabin to you on a towboat? [530] A. What value?

Q. Yes.

A. Well, for to live in the same as on any other boat.

Q. You have plenty of cabin left on her for the men that work on her, haven't you?

A. What?

Q. Plenty of room left in her for cabin?

A. Yes; but if we want to sell her, could sell to better advantage by having a nice cabin on her that was all finished in mahogany. The cabin was no detriment as a towboat.

Q. So you charge as a loss then to your company

(Testimony of Daniel Kern.)

the destruction of a portion of the cabin?

A. We are out that cabin.

Q. On the basis that when you would go to sell her that would be a loss to you? A. Yes, sir.

Q. What? A. That would be a loss.

Q. But her efficiency was in no way diminished or her value diminished to the Columbia Contract Company by the loss of that cabin aft?

A. Yes, it was; it was a valuable cabin.

Q. How much was the value?

A. I don't think we could replace that cabin short of two thousand dollars.

Q. As a matter of fact, wasn't that boat in more efficient shape with the room in the stern for your operations?

A. No; we did towing alongside; makes no difference with that.

Q. Did you ever charter or lease her?

A. No; busy with her ourselves.

Q. Did you ever charter or lease other towboats?

A. Yes, sir. [531]

Q. The bitts are right after the house there on most of those boats? A. Bitts after the house?

Q. Yes; don't these other people that lease boats or charter them use them?

A. This boat had bitts after the house there.

Q. I know; but speaking about the loss of that cabin, isn't it a fact the boat is more valuable for this purpose when the boat has a little room in the stern?

A. A little room?

Q. Yes.

(Testimony of Daniel Kern.)

A. The boat has plenty of room there for handling the lines. We are not making any claim for the loss of the cabin.

Q. Then you are not making a claim for the loss of the cabin?

A. I say, we are entitled to more money than we put in on these claims.

Mr. WOOD.—No; it goes to show our good faith in making up these bills that we didn't insist on the last pound of flesh to which we would be entitled.

A. This boat shows two masts; this boat repaired has only one mast. We didn't charge you for that mast. This mast here was broken off. That is the same mast; we just took and trimmed off the stub. We didn't charge for that mast, any of them masts.

Q. Now, isn't it a fact that when your company took this boat, the "Daniel Kern," and put her in shape again after the collision with the "Elder," they put her in the shape that was necessary for its uses?

A. Well, it wasn't in better shape than it was before, except one or two instances where we made things a little better, but we gave you credit for it. We didn't charge you more for it, [532] like putting the electric light plant in. We put some of the wires in conduits where they were in mouldings before. We gave you credit for the conduits, didn't charge you for them.

Q. If it had been advisable to have two masts on her, would they have been put in by you?

A. Yes; we didn't need them, but if we were to sell

(Testimony of Daniel Kern.)

that boat those two masts would be valuable.

Q. Isn't it more valuable now? A. No, sir.

Q. In the way she is for the purposes than if she had been put back again? A. No, sir.

Q. What could she be used for otherwise?

A. Could be used for passenger boat if she had this cabin on; she is a good passenger boat.

Q. What was her capacity for passengers?

A. For passengers?

Q. Yes.

A. Well, I suppose daylight run we would probably get—probably a hundred or a hundred and fifty passengers.

Q. In daylight run, yes; where, for instance?

A. Lots of places on the Sound where could run that boat.

Q. Yes, merely a daylight run.

A. She could carry, probably, forty passengers and accommodate them with sleeping quarters.

Q. How far would forty passengers go towards paying expenses?

A. I don't know; never was in the passenger business.

Q. That is what I was leading up to. There is nothing more, Mr. Wood. [533]

Redirect Examination.

Q. Mr. Kern, you referred to a certain photograph here of the "Kern" after she was repaired. I hand it to you and would like to have it identified and go in evidence. Is that it?

A. Yes, that is as the boat looks after repairs.

(Testimony of Daniel Kern.)

Offered in evidence, received without objection and marked Damage Exhibit "K."

Q. Mr. Kern, these accidents like the slipping of chains, etc., when you were raising the "Kern" that you told Mr. Reed about, are not any different from the accidents that always occur in salvage operations under difficulties of that kind, were they?

A. No, sir.

Q. Were those expenses that you incurred as shown on the lists which we introduced in evidence, necessary expenditures on the boat to raise the boat and repair her?

A. Yes, sir.

Q. Were they reasonable expenditures? Could the work have been done for less?

A. I don't think it could.

Questions by Mr. CAMPBELL:

Q. In your claim for \$6,750.00 on account of demurrage or detention of the "Kern," your time runs from August 18th to December 31st. Now, I will ask you if that is all the time that the "Kern" was out of commission as a result of this accident?

A. No, sir.

Q. When did she come off the drydock with respect to the time when you ceased claiming for her demurrage?

A. We didn't charge any demurrage after she was off the drydock, but she was a long ways from being finished.

Q. After she was off the drydock, what further repairs were put upon her to complete the damage?

[534]

(Testimony of Daniel Kern.)

A. They built bulwarks on her afterward and laid deck and repaired the machinery. Didn't get that boat ready to run until about the first of March. We didn't charge any time for that while that boat was being finished up.

Q. So, as I understand, your claim is based upon the period you were out of the use of that vessel during the raising and drydocking? A. Yes, sir.

COMMISSIONER.—Do you know what it cost to construct a boat like the "Kern"?

A. Oh, that boat would cost, I expect, about \$125,000. She was built of oak, was oak boat throughout; oak and teakwood.

Mr. REED.—When would that be? When do you figure that construction, now or then?

A. Then; cost you a whole lot more now.

Mr. REED.—A good deal more now. Was it any more valuable to you by being constructed of oak and teak?

A. Sure; would last a whole lot longer; the life of the boat. No limit to it, better than steel.

Mr. WOOD.—Was built of Eastern white oak, wasn't she? A. Yes, sir.

Witness excused.

Whereupon proceedings herein were adjourned until to-morrow. [535]

Portland, Oregon, Wednesday, July 19, 1916.

2 P. M.

Mr. REED.—I will object, not to the form of the account as shown but to the substance of the evidence on the ground that it is incompetent, irrelevant and

(Testimony of Daniel Kern.)

immaterial, inasmuch as the question is of damage to the "Kern" at the time of collision, and the evidence produced in the checks, vouchers and accounts are based only on the cost of raising and repairs, not in connection with the value of the boat at the time of the collision, the evidence being that she cost thirteen thousand dollars and had one boiler added. And also to the evidence in the account on the per diem for loss of time named as demurrage on the ground that sufficient showing has not been made to support the written claim of \$50.00 a day for the need or use of the boat during that time.

I have a couple of questions I would like to ask.

Mr. CAMPBELL.—Are those all your objections?

Mr. REED.—I have no objection to the specific evidence.

Mr. CAMPBELL.—Does that complete the objection?

Mr. REED.—That completes objections to the offer of written testimony made; the lists and vouchers and accounts.

I would like to have Mr. Kern recalled for further cross-examination. [536]

**Testimony of Daniel Kern, for Libellant (Recalled—
Cross-examination).**

DANIEL KERN, recalled for further cross-examination.

Questions by Mr. REED.

The Columbia Contract Company at the end of the year has a balance sheet, I presume, or list of assets and liabilities? A. Yes, sir.

(Testimony of Daniel Kern.)

Q. Do you know what the "Kern" stood on your books in value on the 31st day of December, 1908, the year previous? A. I do not.

Q. Can you ascertain it? A. I think so.

Q. Will you bring your original record to show what she was entered in your books at that time?

A. Well, if I can find it, I will.

Mr. CAMPBELL.—May we ask upon what ground that is material? What is your theory?

Mr. REED.—The theory is this: The question of damage is damage to the "Kern," and it may be the cost of what was done by the libelant adds up such a figure, but it may not be damage to the "Kern"; there might have been a great many things happen we know nothing about that would have enlarged these figures very greatly.

Mr. CAMPBELL.—You can't prove that by proving the book value of this boat in 1908. You have to prove that by cross-examination of these witnesses, or independent testimony showing there were other damages included in this bill.

Mr. REED.—We can lead up to that; that is what I want to show. I merely want to show my good faith.

Mr. CAMPBELL.—We are not questioning your good faith; questioning the materiality of a demand upon us to bring the [537] books to show the book value of this vessel in 1908. Our rights are simply these: We had a right to have that ship repaired, the damage done by the collision repaired so as to restore the ship in as good a condition as she was before the

(Testimony of Daniel Kern.)

collision; that is what we are attempting to prove. Now, in addition to that we are entitled to compensation for the time that was lost by being deprived of the use of the vessel during the time laid up. Now, on these two questions, how can you represent to the Commissioner that the evidence of book value in 1908 is material or pertinent?

Mr. REED.—Because I presume they didn't have any book value at June 30, 1909. If they had that I would prefer to have it.

Mr. CAMPBELL.—That is an evasive answer.

Mr. WOOD.—Suppose they had a book value of ten dollars. It wouldn't have any value at all.

Mr. REED.—Would certainly enlighten the Commissioner as to what he thinks about it.

Mr. WOOD.—I don't think so. It is a well-known fact many corporations carry property at a value of ten dollars when it is really worth fifty thousand.

Mr. CAMPBELL.—How can the value of the vessel be material to this inquiry?

Mr. REED.—Because I don't believe as a matter of law that any unlimited amount can be recovered.

COMMISSIONER.—Don't you think they had a right to raise this boat and repair it, Mr. Reed?

Mr. REED.—They did, yes; had a right to raise and repair it.

COMMISSIONER.—The question here, it seems to me, is [538] whether or not those repairs were necessary. Were they made? If they were not, of course, that has to be shown.

Mr. REED.—If they were not, then a certain

(Testimony of Daniel Kern.)

amount of that would not be allowed.

COMMISSIONER.—That is true; but I take it you want to show that either by cross-examination and questions on these vouchers, this evidence, or else would have to show it by some affirmative proof. That would be my judgment. I shall not exclude the testimony if you want to put it in, because it will all come up on the question of exceptions to the report, anyway; and if you want to put the testimony in you will have that privilege, of course, because that is simply my opinion and the Court or judge may take a different view of it.

Mr. WOOD.—Well, we have received notice to produce them; you say you will admit it, so if we can find it we will produce it. We will have to go to the quarry, I suppose, for it; it may take a day or two in time.

COMMISSIONER.—That is all you want, Mr. Reed; just the figures that appear on their books?

Mr. REED.—Yes.

COMMISSIONER.—Then you can do that by stipulation, I suppose, if you can't do it any other way.

Mr. REED.—Easy enough to do it; put it in next week or as soon as he gets it. A delay of a day or two doesn't make any difference to me.

Q. Now, Mr. Kern, speaking of the repairs on the starboard side of the boat forward of the point of contact, do you know yourself how much new fir, new timber, was introduced into the side of the boat?

A. No, sir; can tell by looking at the bills. That is the [539] only way I could tell.

(Testimony of Daniel Kern.)

Q. I don't mean the thousand feet. I mean the distance, the number of feet renewed.

A. No; we had to go up quite a ways in that ceiling and outside planking; would have to go quite a ways forward in order to get the planking—in order to strengthen the boat.

Q. Mr. Kern, this boat was used exclusively by the Columbia Contract Company in towing rock barges, was it not? A. Yes, sir.

Q. And its use was the same as that of the Sampson and the other towboats? A. Yes, sir.

Q. Well, in putting the value that you put on this boat in your direct testimony, was that value placed in connection with the use of the boat or the cost of the boat? A. I didn't put any value on it.

Q. You didn't put any value on it?

A. No; I said—I just told you what the boat cost when we bought her. That didn't represent the value of the boat, that statement that I made. And another thing, you asked us to produce the books what that boat stood us in 1908. That is nothing to go by as to what the boat was worth at the time she was sunk, because in the spring of 1909 we put these new boilers in the boat.

Q. Do you remember what that cost was?

A. New boilers?

Q. Yes.

A. No, I couldn't tell you, but we had to do a lot of other work besides putting the boilers in.

Q. The boilers were put in because the old ones were worn out? [540] A. What is that?

(Testimony of Daniel Kern.)

Q. The new boilers were put in because the old ones were worn out?

A. Not particularly worn out, because we are using that boiler ever since; but we didn't get—the steam was not sufficient, and 1908 would not represent this boat at the time she was sunk. You ask us to produce what has stood on our books in 1908. That would not represent what that boat had cost us when that boat was sunk. It was in the spring of 1909 that we put those boilers in, just three or four months before she was sunk, just a few months.

Q. At the time she was purchased she had been raised by the government, hadn't she?

A. She was a wreck when we bought her.

Q. But she had not been repaired? A. No.

Q. This repair work was done by yourself?

A. Yes.

Q. Do you know what it cost?

A. No, sir; I didn't do the repairing. I was sick at the time.

Redirect Examination.

Questions by Mr. WOOD.

Mr. Kern, if you had had the "Kern" the remainder of that year and she had not been sunk, would you have continued to use her in your business? A. Yes, sir.

Q. Is there anything included in this list of damage which we have submitted here, in the way of repairs which were not necessitated by this collision?

A. No, sir; in fact, we didn't put the boat in as good a shape as she was. We substituted fir for oak

(Testimony of Daniel Kern.)

and we substituted [541] galvanized iron for copper; and that boat was all fastened with copper bolts and copper spikes when we bought her from the Government, and we didn't put any of that back in the repairs.

Q. Were all of these bills and checks and vouchers actually paid? A. Yes, sir.

Q. Were the barges "Washtucna" and barge No. 17 repaired as to the damages which were done through cutting these holes in their sides and decks, etc.? A. Yes, they were repaired.

Q. Is the cost of these repairs included in these bills? A. No, sir.

Witness excused. [542]

**Testimony of Theodore Knudsen, for Libelant
(Recalled).**

THEODORE KNUDSEN, recalled by the libelant.

Direct Examination.

Questions by Mr. WOOD.

Mr. Knudsen, in your judgment as a shipbuilder, what would it have cost in 1909 to have duplicated the "Kern"?

Mr. REED.—I now raise an objection to that. I make this objection: The matter of the cost of the duplication of the "Kern" is incompetent and immaterial to show what the condition of the "Kern" was at the time of the collision, and is not available to show the worth or value of the "Kern" at the time of the collision.

Mr. WOOD.—I am perfectly willing to withdraw

(Testimony of Theodore Knudsen.)

the question providing Mr. Reed is willing to have stricken out all his—testimony about the cost of the “Kern,” this thirteen thousand dollars that he talked about as the cost of the wrecked hull. Now, if he wants to go into that phase of the subject I am perfectly willing to meet him on it and show what it costs to build a boat like the “Kern.”

COMMISSIONER.—The testimony will go in under the objection.

A. Well, to build a boat of that class, of that material and machinery and equipment, I think about \$150,000 at that time.

Q. What can you say from your judgment as a wrecker, as to whether this sum of seventeen thousand nine hundred odd dollars that we claim here as expended in the raising of the “Kern” was the reasonable sum for that work?

A. Very reasonable, yes; in my estimation it was reasonable. I performed the work myself and I know it was reasonable. [543]

Q. Now, again, in your judgment as a ship repairer, what do you say as to whether this sum of nineteen thousand odd dollars that we claim for the repairs of the “Kern” was a reasonable amount to do that work?

A. It was; it was done as economically as it possibly could be done.

Q. Was she restored to as good condition as she was before the accident? A. Not as complete; no.

Q. I think you have already testified about her cabin not being placed back; what about her main

(Testimony of Theodore Knudsen.)

mast? Was that put back?

A. Well, the main mast; no, it was not.

Q. Did you testify about fir being used in large part instead of oak? Did you testify to that?

A. I don't know whether I did or not.

Q. Was that the fact? A. Yes, it was.

Q. Can you tell in a general way what the outfit was on the barges, the wrecking outfit, how they were fitted up?

A. Why, were fitted out with chains and cables, long timbers and short timbers; we had, I think, it was four pumps.

Q. What kind of pumps?

A. We had one centrifugal—two centrifugals and two—I think Westinghouse, if I ain't mistaken, pumps.

Q. Were they for pumping water out of the barges when you wanted to lift?

A. Yes, sir. And we had two boilers and two donkeys, two hoists.

Q. Donkey-engines?

A. Yes; we had nine or ten anchors. I ain't quite positive; I think it was nine or ten anchors with chains and cables, equipment; also various small matters that I couldn't place, such as screws, etc. [544]

Q. You had charge of the repairs of the "Kern"; about when were they completed; about what time of the year?

A. Well, I left the Columbia Contract Company on the first day—the last day of the year 1909, but they

(Testimony of Theodore Knudsen.)

were not anywhere near complete then.

Q. At the end of 1909?

A. Yes; the last day of the year.

Q. Up to that time how had the work progressed?

A. As rapidly as possible.

Q. Do you happen to know after you left their employ when it was completed?

A. Well, I was around there occasionally and I think she was done, is my best recollection, some time in March.

Q. Of 1910? A. 1910, the following spring, yes.

Q. When she came off the drydock finally the last time, was she completed then?

A. That was in the spring?

Q. No; I thought she came off the drydock in the late fall? A. Was on drydock four times.

Q. What I mean was, when she came off the drydock in the late fall, was she completed then?

A. No, sir.

Q. What work was done on her after that?

A. Well, the engine work was all done after that, the piping, etc., laying the deck and building the bulwarks, putting wearing strakes around.

Q. You have already described the damage that was done to these two barges in this raising operation. If you can, I wish you would estimate that damage in dollars. [545]

A. Well, of course I would say seven or eight hundred dollars apiece, by judgment, at the least calculation. If you figure the strain them barges had it would be more than that.

(Testimony of Theodore Knudsen.)

Q. I notice on the claim here we claim \$750.00 damage to the "Washtucna" and \$300.00 to the barge 17. What do you say as to whether or not that is a reasonable amount?

A. That is not enough; very reasonable; was not enough.

Cross-examination.

Questions by Mr. REED:

Mr. Knudsen, what do you say about \$150,000 and the "Kern" at the time? That she was worth that or it cost that much to make her?

A. To build new; yes, sir.

Q. She was used as a towboat; and what is a towboat like that worth?

A. I am not speaking about a towboat; I am speaking about a particular boat, the "Daniel Kern."

Q. Did you ever see the "Sampson"?

A. I have, sir.

Q. She does all the work that the "Kern" did, doesn't she? A. I presume she could.

Q. She does more because she is a bar boat?

A. Yes, they are both sea-going boats.

Q. I know both, but the "Sampson" particularly is a bar tug, isn't she?

Mr. CAMPBELL.—What do you mean by bar tug?

Mr. REED.—One that can be used for towing on the bar.

A. Yes, I guess both could be used for towing on the bar.

Q. Could you have used the "Kern" at the time of this accident for bar work?

(Testimony of Theodore Knudsen.)

A. I guess you could. [546]

Q. Could you have?

A. If you had to use, wouldn't be as handy as others, but could be used.

Q. Could, but nobody would use her?

A. Wasn't any occasion to use her.

Q. The other boats were leased out for bar work, weren't they—the "Sampson" and others?

A. I don't know a thing about it.

Q. Do you know what the value of the "Sampson" was at that time? A. Not in particular.

Q. Couldn't tell? A. Oh, I could by looking.

Q. How could you tell how much this boat would be worth and not how much the "Sampson" would be worth?

A. Could tell how much the "Sampson" would be worth by figuring up.

Q. Did you ever figure up what this boat was worth? A. Approximately so, yes.

Q. When did you figure? A. A long time ago.

Q. When?

A. When was working on her, in estimating her condition, giving an opinion.

Q. How much it would cost to make her, figure the cost price, did you?

A. Estimated the condition, yes, sir. Always do when working on boats, figure what the boat is worth.

Q. You say the item of nineteen thousand dollars for repairs was properly applicable; did you do the repairs? A. Yes, sir. [547]

Q. I thought you quit before it was done?

(Testimony of Theodore Knudsen.)

A. I was up to the first of the year, sir.

Q. What proportion of that had been done at that time?

A. Oh, probably about eighty per cent of it.

Q. Eighty per cent of it?

A. Yes, sir; seventy-five or eighty, some place in there.

Q. What proportion was finished at the time of your severing your connection with it?

A. About seventy-five per cent.

Q. I mean, what particular work had been finished?

A. Wasn't any particular work finished at all.

Q. Wasn't anything finished? A. No, sir.

Q. If nothing was finished, how can you state about the character of repairs and all that sort of thing? A. I formed an opinion of those things.

Q. What?

A. What I seen; I was there.

Q. Yes, but if nothing was finished and you quit before it was finished, you didn't see it, did you?

A. Certainly did see it.

Q. Was it finished then?

A. I was there after it was finished; I was down there once in a while, yes.

Q. Once in a while, but you had no connection with it? A. No, sir.

Q. So when you testified to this total amount it was from what some one told you? A. No, sir.

Q. What was it from?

(Testimony of Theodore Knudsen.)

A. Because I had an idea what that work cost when I quit there. [548]

Q. Just an idea?

A. Yes, sir, a pretty close idea too.

Q. With regard to the barges, the tug "Wash-tucna," in what did the damage consist?

A. Why, consist of cutting into her deck and cutting into gunwales, breaking her rails, cutting these stanchions, cutting into her frames, ceiling and planking; cutting into her ceiling, fitting cables around her keelson.

Q. Well, now, how many valves or holes did you cut in the sides? A. I told you I cut one.

Q. And how large was it?

A. About one foot square, approximately a foot; might be a little larger.

Q. And I suppose you threw her over to get that below the water-line? A. Yes, sir.

Q. And then you slid a sliding cover over that to keep the water out when you pumped her out?

A. Yes, sir.

Q. And you put two holes through the keelson, did you? And then you made the ropes or chains that went through the deck down to the keelson, fast in the keelson, did you? A. I did.

Q. How many other places was the keelson cut?

A. That is the only place the keelson was cut, two places.

Q. What planking was destroyed on her?

A. Why, the gunwale plank; the sheer plank was destroyed in certain places.

(Testimony of Theodore Knudsen.)

Q. How far? A. I don't know. [549]

Q. Ten feet?

A. Yes; you can't get planking ten feet; has to be twelve or sixteen feet.

Q. One hundred feet? A. Forty feet.

Q. The ceiling is what you refer to as deck?

A. No, ceiling is not deck.

Q. When you say ceiling is that the side of the boat? A. The side of the boat inside.

Q. That is where you cut through one hole?

A. Yes, but cut inside and out, both.

Q. You say frames? A. Yes, sir.

Q. What frames?

A. Why, planks, planking. This planking which forms what is the ceiling; in other words, ribs.

Q. What did you do to that?

A. Cut a hole through that to get my opening through.

Q. Did you cut a one-foot hole through them?

A. Not one foot; I cut part of it out.

Q. Did it weaken it any? A. It certainly did.

Q. I don't understand that; you cut a one-foot hole? A. Yes, sir.

Q. And you went through the frame to make that hole?

A. The frames isn't twelve inches apart, you know.

Q. They are not? A. No.

Q. You had to take out one of them?

A. Yes; had to take a part of it.

Q. What stanchions were destroyed?

(Testimony of Theodore Knudsen.)

A. The only stanchions is what goes from the covering board up; [550] they were cut by cables and broken off.

Q. And rail is what you described before, is it, or is that additional?

A. No, the rail is the part that goes on top of the stanchions; the wires cut right through the rails, stringers and all.

Q. That is where these big logs went across?

A. Yes, sir.

Q. These gunwales, too?

A. No, the gunwale is below; the gunwale is the covering board and the shear strake is the gunwale.

Q. That is all covered by that same length of, say, forty feet where these big piling, boards, whatever you call them, went across there? A. Yes, sir.

Q. Then you cut the decks? A. Yes, sir.

Q. How big a place in the deck?

A. So a man could get his hand around there and pick up the pieces; pick up the cables; pass the cables around?

Q. Pass the cables up through? A. Yes, sir.

Q. That charge in here is \$750.00? A. Yes, sir.

Q. And your estimate is that cutting that hole in there a foot square and laying the piling across destroyed, say, forty feet of the rail and gunwale and whatever it may be there, and the hole in the keelson and the holes in the deck amounted to \$750.00?

A. Yes.

Q. What is the cost of the scow?

A. Cost of her?

(Testimony of Theodore Knudsen.)

Mr. WOOD.—It isn't a scow; she is a barge; a whole lot of difference. [551]

Q. Barge.

A. You mean to-day or at that time?

Q. That time?

A. Oh, about sixty thousand dollars.

Q. Sixty thousand dollars? A. Yes, sir.

Q. She was a hull? A. Sir?

Q. She was a hull with a little house aft?

A. Was a regular ship without spars. Full equipped ship without spars and rigging. She had anchors and chain, windlass and cabin, regular ship; model built ship. I guess you are under the wrong impression as to what kind of a barge she was.

Q. I went by those photographs; now then, was the "Washtucna" similar to 17 shown in Exhibit "B"?

A. She was a model vessel as well as No. 17 was; yes, sir. Only that is to say 17 used to be a steam schooner and 17 was a tow barge or tow vessel.

Mr. WOOD.—You said 17 both times.

A. 17 used to be a steam schooner and the "Wash-tucna" used to be a tow barge or sailing schooner. You can see right there is the bulwarks and rails; of course you can't see the after part of it, but they are both model boats.

Q. Is this \$750.00 item based on the time in doing this or the damage to the boat?

A. Labor and material.

Q. Labor and material? A. Yes, sir.

Q. The \$750.00 was labor and material?

A. Yes, sir; it is very cheap at that. It cost more

(Testimony of Theodore Knudsen.)

than that, as a matter of fact.

Q. Well, in this list this item is bulked.

Mr. WOOD.—No, it is not; damage to the “Washtucna” \$750.00; damage to No. 17, \$300.00. [552]

Q. What makes the difference between \$300.00 charged to the account of 17 and \$750.00 on the “Washtucna”?

A. Because there wasn’t as much damage done to No. 17; was no rails busted, no stanchions and the frames were further apart. We didn’t have to cut through her frames, and she had limber planks in her hold in the place of having solid ceiling, so we could just lift them up. We didn’t have to cut through her ceiling and replace it again.

COMMISSIONER. — She was a cheaper craft than the other one?

A. She was lighter constructed, yes, sir.

Witness excused. [553]

Testimony of Fred Ballin, for Claimant.

FRED BALLIN, a witness called on behalf of claimant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. REED:

Please state your name, residence and occupation.

A. Fred A. Ballin; Portland, Oregon; naval architect.

Q. And residence. You live in Portland, I believe? A. I do.

Q. You say your occupation is that of naval architect. And how long have you been in Portland at

(Testimony of Fred Ballin.)

that occupation? A. Nineteen years.

Q. Have you followed that occupation here during the nineteen years? A. Yes, sir.

Q. Did you know the "Kern" at the time of this collision is the summer or August of 1909?

A. Yes, sir.

Q. Can you state what her value was at that time?

Mr. CAMPBELL.—Objected to as immaterial to the issues in this case.

COMMISSIONER.—I don't think it is material, but this order does not specify about allowing the Commissioner to exclude testimony; so I will just let down the bars and let it in under objection.

Mr. CAMPBELL.—So the record will show our objections.

COMMISSIONER.—You can answer the question, Mr. Ballin.

A. Well, in order to answer a question of that kind it depends altogether on whether you place the value of the vessel at [554] its original cost or its earning power, what it is used for, because I know and everybody knows the "Kern" was originally built for the Government as a lighthouse tender, and was a lot of money spent on that boat for purposes which are of no use to the men who were then using it or to the company which was then using it as a towboat. I have known the boat while she was still in the possession of the Government and she had outlived her usefulness there. I know I done some work for Mr. Kern on the boat when he took her over, making her suitable for a towboat, and she was used as such

(Testimony of Fred Ballin.)

afterwards. Now, as a towboat you can compare her in value only with boats of the same nature which do the same kind of work.

Q. And as such, what would you figure her value to be?

A. And in comparing her with boats of the same class and kind, and taking in account her age at that time and the kind of machinery she had, I should judge the boat would be worth probably between twenty-five and thirty thousand dollars.

Mr. WOOD.—At the time she was sunk?

A. At the time when she was in good condition.

Cross-examination.

Questions by Mr. WOOD:

Mr. Ballin, when you say she had outlived her usefulness—

A. As a lighthouse tender.

Q. You mean to the Government?

A. As a lighthouse tender.

Q. Yes; and in saying that you think she was worth twenty-five or thirty thousand dollars and no more, you again speak of her as purely a towboat?

A. As a towboat. [555]

Q. You take no account of the materials with which she was constructed; that is, that they were white oak and she was a very well built boat. In other words, you consider that when she is relegated to the class of towboats and engaged in that business, she is to be valued as a towboat only?

A. If I should value that boat for the purpose that Mr. Kern was using it at the time in comparison with a boat like the "Sampson," which I built

(Testimony of Fred Ballin.)

for him, I would say that boat would be worth probably that much money.

Q. In placing that value on her, have you taken into account that she had new boilers recently installed just before the collision, and that her machinery had been overhauled and put in good shape?

A. Yes, sir.

Q. You figured that? A. Yes, sir.

COMMISSIONER.—You don't mean to say that you *could* a boat like that for that much?

A. I didn't say that.

Mr. CAMPBELL.—As I understand your testimony, you are endeavoring to tell the Court in your opinion that boat for Mr. Kern's purposes was worth twenty-five thousand dollars to him?

A. I said between twenty-five and thirty thousand dollars in comparison—considering her—understand me right; I say this: Considering her age and the time she was still being used for a boat, other points in consideration would have limited power as she has, and the amount of work you can get out of her—because you couldn't use her to advantage where you could use other boats, and in comparison with price, the cost of other [556] boats, similar boats down there, I would say at that time, 1909, that boat was not worth more than twenty-five or thirty thousand dollars.

Questions by Mr. CAMPBELL:

What did you build the "Sampson" out of?

A. Built out of fir.

Q. Frames fir? A. All fir; yes, sir.

(Testimony of Fred Ballin.)

Q. What were the frames of the "Kern"?

A. The "Kern" is built of oak.

Q. What is the comparison between the price of fir and of oak, Eastern white oak, in 1909 in the Port of Portland?

A. You couldn't make any comparison; that is, you couldn't consider that comparison because at that time the "Manzanita" or the "Kern" was a boat that had lived probably twenty years.

Q. That isn't my question, Mr. Ballin; I am asking you to give me a comparison in price of oak and fir in this state at that time.

A. At that time it would be—the oak would cost you at that time nearly two and a half times as much as fir.

Q. Did you build the boilers into the "Kern"?

A. No.

Q. The new boilers for the "Kern"?

A. I did not.

Q. Did you know anything about the work that was done on her by Mr. Kern after her purchase from the Government? A. Yes, I do.

Q. Well, did you inspect that work?

A. I did not.

Q. Did you have anything to do with making those repairs? A. I fixed up his engines. [557]

Q. I am speaking about the work on the vessel itself. A. On the vessel I had nothing to do.

Q. You say you fixed up her engines; you mean that you did that yourself personally or that the Willamette Iron Works did it?

(Testimony of Fred Ballin.)

A. When I say I fixed up, I superintended it and made plans for it and let the contract. The Vulcan Iron Works, I think, did the work.

Q. In fact, all that you did to that engine was to put in a steam reversing gear, wasn't it?

A. Reversing gear.

Q. That is all Mr. Kern asked you to do?

A. That is all.

Q. And it was for that purpose alone he employed your expert services as a designer of engines?

A. He did; that is all. I just simply made those engines. He started to improve that so he could use it as a towboat because that wouldn't reverse.

Q. I am not asking you what your opinion is as to what he thought. A. What he told me.

Q. I asked you what you did.

A. What he told me.

Q. All you did for him, as I understand, was to design a steam reversing gear to put on that engine?

A. Yes, sir.

Q. You never made any inspection of the hull of that vessel, did you?

A. Never in a professional way; no.

Q. That is what I mean. [558]

Questions by Mr. WOOD:

Mr. Ballin, just one question. At that time Mr. Kern was using the "Daniel Kern" for the same purposes he was using the "Sampson," wasn't he?

A. He was and he was not. He was using the "Sampson" for outside and inside work and he was using the "Kern" for inside work only.

(Testimony of Fred Ballin.)

Q. Mr. Ballin, how does Eastern white oak compare with fir in the hulls of these vessels as to the life of the two timbers?

A. They will both rot in fresh water if you don't take care of them.

Q. Doesn't oak last much longer than fir?

A. Not very much.

Q. Isn't it a fact that repairs have to be made to a fir hull much oftener than a white oak hull.

A. Not if they are properly built. We built the "Sampson" seventeen years ago and I think she is in good condition to-day. We built her of fir.

Q. Hasn't she been kept up by more frequent repairs than the "Kern" has?

A. No, she has not. Mr. Kern had another boat, the steamer "Rochelle" was rotten all the way through, was made of white oak.

Q. How old was she?

A. About the same age as the "Manzanita."

Q. "Manzanita" is not rotten all through and never was?

A. I don't say she was. I am saying the fact that she was made of oak doesn't have all to do with it.

Q. No, but if made of oak and properly built has a lot to do with it?

A. The same as fir. [559]

Q. You think the difference between the "Rochelle" and the "Manzanita" was due to the fact that the "Rochelle" was not properly built and the "Manzanita" was?

A. No; the "Rochelle" was not properly salted

(Testimony of Fred Ballin.)

and not properly taken care of.

Q. The "Kern" was?

A. The "Kern" was; the "Kern" was in Government employ and she was well looked after.

Q. The "Rochelle" came from the Great Lakes, didn't she? A. Yes, sir.

Q. And was not copper-sheathed?

A. That didn't preserve her any.

Q. She wasn't, was she?

A. She was not, but that didn't preserve her. The "Kern" was copper sheathed. She was not copper-sheathed above the water-line, but the rotting in these boats takes place above the water-line, where they are not sheathed. They generally give out on the decks.

Redirect Examination.

Q. Do you know the difference in power between the "Sampson" and the "Kern"?

A. The "Sampson" has about twice the power of the "Kern."

Q. Twice the power; and the only change made by the Columbia Contract Company after the "Manzanita" was raised and purchased by the Columbia Contract Company was to put in reversing gear?

A. No; no.

Q. I mean in the engines; was that it?

A. No; I beg your pardon. I don't know what changes they made.

Q. You don't know what else they did?

A. I don't know what they made on the hull.

(Testimony of Fred Ballin.)

Q. I don't mean the hull; I mean the engines.

A. The machinery they overhauled; the machinery generally, as far as I know, and the changes necessary in order to make a towboat was to make a steam reversing gear to keep her from stopping on center.

Mr. CAMPBELL.—Mr. Ballin, are you the man who built the "Goldsborough" for the Government?

A. Yes, sir, I did.

Mr. CAMPBELL.—I thought so.

Witness excused. [561]

Testimony of R. C. Hart, for Claimant.

R. C. HART, a witness called on behalf of the claimant, being first duly sworn, testified as follows:

Redirect Examination.

Questions by Mr. REED:

Please state your name, residence and occupation.

A. Richard C. Hart; Portland, Oregon; with the Lighthouse Service.

Q. As I understand it, you are connected with the United States Lighthouse Service, and did you as such have to do with the sale of the "Manzanita" some years ago? A. I did.

Q. Do you remember what year it was in?

A. 1906.

Q. Will you please state whether or not the "Manzanita" was sold on the public market?

A. She was.

Q. Under whose supervision?

A. Lighthouse inspector.

Q. Well, who had charge of it? Who was the in-

(Testimony of R. C. Hart.)

dividual? Was it your department?

A. It was our department; yes, sir.

Q. Were bids offered?

A. We called for bids.

Q. And do you know what the price was?

A. \$13,341.00.

Q. Was it before or after she was raised?

A. After.

Q. And where was she; on the beach somewhere?

[562]

A. No; she was down at Tongue Point lighthouse depot.

Q. The Government made no repairs? They just raised and sold her?

A. Just put on a patch on the outside so she could be towed around.

Q. It was then after a collision with the port of Portland dredge, was it? A. Yes.

Q. Was she badly damaged?

A. She had a hole punched in her starboard bow.

Q. Starboard bow? A. Yes, sir.

Q. Do you know where it was? How, in connection with the foremast?

A. I should think it was about fifteen or twenty feet forward of the foremast.

Cross-examination.

Questions by Mr. CAMPBELL:

How long was she sunk before she was raised?

A. She was sunk, as I remember, in October and was raised somewhere about the end of November.

Q. Two months?

(Testimony of R. C. Hart.)

A. Some six weeks or two months.

Q. And whereabouts was this collision?

A. Near Westport, in the Columbia River.

COMMISSIONER.—Down about St. Helens, wasn't it?

A. No; way below that. Down at the head of Puget Island.

Witness excused. [563]

Testimony of Captain J. E. Copeland, for Libellant.

Captain J. E. COPELAND, a witness called on behalf of the libellant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. WOOD:

Captain Copeland, were you on the "Kern" at the time she was sunk? A. Yes, sir.

Q. In what capacity? A. Master.

Q. When was she sunk?

A. She was sunk at one o'clock on the morning of the 19th of August, 1909. As nearly one o'clock as I can tell. My watch stopped at a quarter to one. Went down with the boat. I suppose was about when she sunk.

Q. When were the raising operations started with the barges?

A. As nearly as I can tell, 28th of August, 1909.

Q. You say as nearly as you can tell?

A. As nearly as I can tell by the time-book. We did a lot of skirmishing around, of course, before we hired a lot of men, and the men's time began on the

(Testimony of Captain J. E. Copeland.)

28th of August. I have the time-book here.

Q. No; if you are satisfied.

A. Yes; the 28th of August is when we began to keep the time for the raising of the vessel.

Q. About how long were the barges used in that operation?

A. Well, they were used continuously in that operation from the time we began, the 28th of August, until the boat was in the drydock and for five or six days after she went into the drydock, in October. I think it must have been a good week, [564] anyhow, after she went in drydock that we were using the barges there.

Q. To what date would that carry the use of the barges?

A. That would carry up to about the 25th—about the 25th or 26th of October; I don't remember the exact date that we got to the drydock, but I think it was about the 19th or 20th, the 20th possibly. I think the 19th we got to the drydock—no, the 20th we got to the drydock; the 19th the men's time stopped; that's right. The 19th the time of the men stopped; the 20th we arrived at the drydock.

Q. You didn't go on drydock as soon as you got there?

A. No; we had to wait; a vessel in drydock and we couldn't get in.

Q. About how many days did you have to wait?

A. I think about three days.

Q. So that would be about the 23d you went in drydock? A. Yes, sir.

(Testimony of Captain J. E. Copeland.)

Q. And the barges, you say, were in use a week after that? A. Yes, about a week after that.

Q. That would carry it up, then, until the end of October? A. Yes, about the end of October.

Q. Why were the barges necessary to use there after the vessel went on drydock?

A. There was a lot of refuse there we had to put on the barges and take away, they didn't want around the drydock.

Q. Such as what?

A. Such as rock and mud and stuff that came out of the vessel.

Q. How about her engines, machinery and the like of that?

A. No, we didn't take any machinery out. [565]

Q. And cables and things of that kind?

A. Was a lot of cables that was used there that we brought to town on the barges, and I don't know but what a lot of jack-screws and some chains; a lot of chains that we had in raising the vessel.

Witness excused. [566]

Testimony of William B. Honeyman, for Libellant.

WILLIAM B. HONEYMAN, a witness called on behalf of libellant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. WOOD:

Mr. Honeyman, what is your business?

A. Engineer, surveyor and appraiser.

Q. Will you please state your business as a marine engineer?

(Testimony of William B. Honeyman.)

A. I have been surveyor for Lloyds, that is, engineer's surveyor since 1893 almost exclusively, up to the time Henry Hewitt died. There have been very few Lloyd cases since that time; I have been on one or two along with the hull surveyor, Captain Veysey.

Q. In addition to being Lloyds' surveyor, have you had other experience with marine engines?

A. Yes, sir.

Q. And machinery? A. Yes, sir.

Q. What is it?

A. Repairing them when I was in the foundry business; in the foundry business up to 1906 for thirty-four years.

Q. Were you employed to make a survey on the "Daniel Kern" after she was wrecked with the "George W. Elder"?

A. Yes, sir; employed by both Lloyds' agent, Henry Hewitt, and Mr. Kern.

Q. Who was employed with you on the survey?

A. Captain Crowe.

Q. Is he living now?

A. No; he was drowned several years ago on that vessel down there at Tillamook. [567]

Q. Did you and Captain Crowe embody the results of your survey in a written report and recommendation? A. We did.

Q. I show you a paper and ask you if that is it?

A. That is our report; there were five or six copies of that report made and that is one of them.

Q. Captain Crowe was more particularly the sur-

(Testimony of William B. Honeyman.)

veyor of the hull and you were more particularly the surveyor of the machinery?

A. Yes; I didn't go down to where the vessel was sunk. I didn't take part in any connection with it until they got her on the drydock; then we worked together, both on the "Kern" and on the barges.

Q. On page 5 of this survey and report is a heading entitled "Engine and machinery report." I want to ask you, Mr. Honeyman, if that is a part of the report that fell within your particular jurisdiction.

A. Yes; that is the report that I made as to the damage that was found there, and the recommendation of the extent of the repairs that were to be made, and replacement of the stuff that was entirely destroyed.

Q. You made that, of course, from a personal survey of the vessel?

A. Yes; Captain Crowe was along with me and I was along with him on the hull. We went through the hull after the ballast was taken out of the boat, cleaned out. We estimated was about a hundred tons of ballast, rock ballast aboard there; probably nearly as much weight of mud, and after that was cleaned out we then made the particular survey of that hull and machinery. [568]

Q. Does this report, and more particularly the part that you wrote about the machinery, correctly state the damage to the machinery and the repairs that were necessary to put it in shape again?

A. Yes.

(Testimony of William B. Honeyman.)

Mr. WOOD.—I offer this survey and report in evidence.

Mr. REED.—Is it all offered?

Mr. WOOD.—Yes.

Mr. REED.—Including the report of Crowe?

Mr. WOOD.—Yes; they both signed it jointly.

Mr. REED.—I make this objection: That in either event it is a self-serving document and not an admission of the claimant and is not admissible evidence, being his own writing and declaration; and also it is hearsay on the part of the statement of Captain Crowe.

COMMISSIONER.—Might be the opinion of an expert; I don't know for what purpose offered, of course.

Q. Page 2, Mr. Honeyman, is a heading, "Examination on Drydock," in which many references are made to the damage to the machinery. I want to know if that part of the report relating to the machinery there was the result of your survey?

A. I was along with Captain Crowe and we jointly made the survey.

Q. You made that up together? A. Yes, sir.

Q. As a joint report?

A. Yes; we made that the first time we went aboard, the ballast not being removed; and we made our final survey in particular when that was removed so we could get to the hull.

Q. Without withdrawing this at all, letting it remain in evidence [569] I want to ask Mr. Honeyman if the parts of that report relating to the ma-

(Testimony of William B. Honeyman.)

chinery were written by himself as a correct report of the condition of the machinery at that time.

A. The part that I put in there on the machinery was written by myself.

Q. And was that a correct statement at that time, based on your own investigation of the condition of the machinery, as you found it?

A. Yes, and in addition to that a return survey was made; the survey was made—

Q. I am coming to that.

Mr. WOOD.—Then I think the report is in any event admissible as a record of his past recollection.

Mr. REED.—I object to it on the ground it is incompetent, immaterial and irrelevant, a self-serving declaration, not a part of the *res gestae* and not admissible on any ground.

Q. Could you state, Mr. Kern, independently of that report, now in detail the damage to the machinery, and the recommendations you made, or would you have to rely on that report?

A. Oh, no, I know in a general way all I did. If you will notice on that report, it is put in general terms there. Now, take the item of electric lighting and dynamo for running it; that is just general. It was a general wreck there and called for complete installation of that and rewinding the dynamo.

Q. Yes, but what I am getting at, could you now, independent of that report and without looking at it, state the condition of that wrecked machinery, and what it was necessary to do to repair it as accu-

(Testimony of William B. Honeyman.)

rately and in as full detail as this report itself does?
[570]

A. I think I could, generally.

Q. All right, go ahead and do it.

A. Well, the collision had cut the boat something—ten or twelve inches forward of the stern post, which would make it probably 25 feet from the extreme deck line, the overhang, and the “Elder” had penetrated the hull there to within ten inches of the mid-ship line. That caused the carrying away of some timbers; struck the intermediate shaft in the crash there so that it broke the couplings on the intermediate shaft, also the stern bearing of the tail shaft, which was a bronze casting or brass, and it damaged that so, cracked it right through, so it had to be replaced; that was a casting weighing between eleven and twelve hundred pounds; that had to be replaced, and the breaking of the coupling, took a terrible force to do that, because my recollection is that was about a seven or eight inch shaft, and took an awful force to break that coupling. Now, all the asbestos covering on the boilers and all the pipes were either shifted or knocked off; it was all gone so it had to be entirely replaced; the piping was bent and crooked and filled with silt to such an extent it had to be all taken off and replaced, where bent or broken, and put back again. Then all the gauges—I think it was six gauges altogether, steam pressure gauges and water gauges, they were all entirely destroyed, had to be renewed. One of the pumps was broken so it was entirely—it was bet-

(Testimony of William B. Honeyman.)

ter to put a new pump in than to repair it; it would cost more to repair it than new would cost, and the other pumps, not thoroughly destroyed, were all filled with silt and sand, and it was necessary to take apart and clean them and put them back again. That applied to all the machinery, because in addition to the rust and silt damage [571] there had been some fuel oil, I presume, which made a terrible mess of it, and it was quite a big job to clean the material out of the interior of that hull, and the machinery, it was in such a muss it had to be practically taken apart in detail, cleaned up and the broken parts replaced with new, and the old ones reinstalled, where possible to use.

Q. What about the dynamo?

A. I spoke about the dynamo; that was entirely a ruin; the wiring was all down and all the gauges—meters and gauges entirely gone, and called for new ones there, and the dynamo was used by rewinding it; the covering of the cylinders, that is another thing that was entirely down; that is all covered with walnut covering, dark and light streak alternately; that was all swelled and broken, so it had to be entirely replaced.

Q. Were these engines—main auxiliary engines, etc., rusted at all?

A. Very much rusted.

Q. Did that rust prevail over most of the machinery and equipment of the vessel?

A. Of course where it was oily it didn't cut in the same as it did where there was no oil on the surface

(Testimony of William B. Honeyman.)

of it; was all susceptible of being cleaned up though.

Q. Independent of this report of yours, can you state the recommendations you made, or would you have to rely on it?

A. They are only made in a general way. I didn't go into all the details because it was such a general damage there that it all had to be taken care of; even the portions of it that could be used had to be taken off and cleaned and reinstated. Now all the bearings of that shaft I spoke of, [572] and also the shaft, both forward and aft, all that, they were all knocked out of line and the fastenings broken. In carrying away the shaft, they carried away the bearings they ran in. The whole shaft was thrown out of line something like ten inches I think it was, running line where they were originally. It was about ten inches on the after part of it out of line with the forward part of the shaft; that is the crank shaft; you see there is an intermediate shaft that went between the tail shaft and the crank shaft, and the intermediate shaft was carried ten inches out of line.

Q. Possibly you didn't get the question. I wanted to know whether, independent of this report, you can state the specific recommendations that you made for the repair of the machinery, or whether this report states them more accurately than you could at this time. A. They are in the report.

Q. I didn't mean can you state them definitely. I mean can you state them?

A. Yes, just as I have stated, the greatest damage—

(Testimony of William B. Honeyman.)

Q. You have told us what the damage was but you haven't yet stated what would have to be done.

A. Well, be all replaced, and those that were susceptible of use again were to be cleaned up—taken out, cleaned and reinstalled, and where there was any broken or bent pipes or connections they were to be replaced with new; new gauges furnished.

Q. I see that this report of yours contains seven specific recommendations for repairs to the machinery. Now, can you state them from your memory? What I want by that is just [573] expressly what you said should be done without refreshing your recollection from this.

A. Well—well, yes, I have already done that. To start out, the engines, the rods, the wire work was all rusty, and the cylinder covering, the lagging on the cylinder, that was all swelled and twisted to such an extent it had to be renewed, had to be replaced new, and then the shaft, the intermediate shaft was carried away from its bearings and the couplings broken.

COMMISSIONER.—You have been over that. I think he has described all this damage.

A. And the same with the stern bearing, and nothing but a general idea of it could be embodied in any report either verbal or written, because it carries all the little incidents of fittings with it. That coupling there now, all the bolts on that, either six or eight, I don't know which now, they were all broken; they had to be replaced in order to make connection between the intermediate and the crank shaft.

(Testimony of William B. Honeyman.)

Report offered in evidence and marked Damage Exhibit "K."

A. Now, in connection with that—it would not appear on my report—now on the copper sheathing where it was necessary to strip off there, it had to be stripped off a considerable portion beyond where the fracture occurred in order to make the planking coincide with the specifications, that called for the planking to be replaced and take at least four frames on every separate strake of planking, so it was necessary to take a great deal of the copper off further than the broken place, in order to get the vessel [574] caulked where she was leaking, and in order to get the timbers back and anchor them in the hull; it would not do to butt them and have the vessel leak there. Every strake of planking had to take at least four sets of timbers in the frame beyond its adjoining timber.

Q. Mr. Honeyman, was the vessel resheathed with copper, where the copper was taken off?

A. Well, we made an estimate of what the re-sheathing would be but whether the sheathing was on there when we made our return survey—the vessel was in the water, and I don't know whether the sheathing was on there or not. I couldn't say.

Q. As I understand certain sheathing was taken off? A. Yes, sir.

Q. Was that part of the vessel recovered again?

A. Not that I know of. It was not covered up to the time we made survey in the drydock.

Q. Did you and Captain Crowe make any estimate

(Testimony of William B. Honeyman.)

as to the amount of damage the "Kern" suffered by not being resheathed, after giving credit for the price you got for selling the copper?

A. I don't think was anything made—an estimate of damage by not doing it, but we made an estimate as to the cost of putting on new sheathing, and following the Lloyd rule for depreciation for the time it was in use there; my recollection is that it was only ten thousand pounds of the copper sheathing which was involved in the stripping off there.

Q. Have you a memorandum of it there?

A. Yes, I think I have. There was 9,294 pounds, No. 24 gauge, the kind of copper that was on there; now that would weigh 9,294 pounds; now, by depreciating that the percentage according [575] to Lloyds' rule it would reduce that to the equivalent of 7,740 pounds new metal.

Q. What was done with the copper sheathing?

A. The copper sheathing was sold and brought nine cents a pound; new sheathing would cost 24¢ a pound. There was a credit made for the old sheathing of \$863 as against a charge of \$1,857 for old—depreciation of new copper; understand \$1,857 would take 7,740 pounds as against 9,294 pounds as it was new.

Q. I would like to get an idea of the result, the net result.

A. The net result would make—or the cost of the resheathing would cost \$1,857.60 and a credit of \$863.62, leaving net loss \$993.98. That was the estimate we made up and that was from actual figures

(Testimony of William B. Honeyman.)

we got; we sold the copper for nine cents a pound.

Q. So as I understand it, if the vessel had been resheathed it would have cost \$993.00 in excess of what the old sheathing was sold for? A. Yes, sir.

Q. Mr. Honeyman, have you had any experience in hiring barges such as were used in this wrecking operation?

A. Well, I have hired small ones. I never hired as large as the "Washtucna" there; that is quite a ship.

Q. Do you know the "Washtucna"?

A. Yes, made a survey of that along with Captain Crowe as to the damage done that.

Q. Also 17?

A. Yes, sir; 17 was one of those river barges. The other was built east, I believe; a ship.

Q. What did you estimate the damage to those two barges at? [576]

A. \$750 on the "Washtucna," and \$300 on No. 17.

Q. What would be the reasonable value, if you had to go out and hire them by the day, of the "Washtucna" and No. 17 if they had this wrecking equipment on them, each of them two wrecking pumps and two steam boilers and donkey hoisting engines and tackles, block wires and connections and a scow barge?

Mr. REED.—I object because the witness has said he has never had to do with a barge of that size.

COMMISSIONER.—I don't suppose there could be two barges exactly the same size.

Q. You have hired barges here on the river?

(Testimony of William B. Honeyman.)

A. Yes, frequently; I never hired one for less than ten dollars and without any equipment whatever. I put the equipment of No. 17, at least the hire of No. 17, with that equipment of—

Q. I just want a lump sum, with all the outfit of the “Washtucna” and 17—with all that outfit.

A. I would say they were easily worth forty-five or fifty dollars a day with the equipment they had on them, pumps.

Q. The whole outfit?

A. Well, yes; without any tender; without any tender or without any crew. That is just for the hire of the barges themselves.

Q. Do you mean that much for each of them?

A. I mean about thirty dollars for the large one and twenty dollars for the small one.

Q. And how much for the equipment?

A. Well, the equipment, the pumps there, I suppose that they would be at least \$10 a day, the price for the centrifugals, and then of course that would not be any crew nor any fuel, you know. Merely the material of the barges and their equipment. [577]

Q. Mr. Honeyman, didn't you tell me in discussing this yesterday, I think it was, that \$125 a day would be cheap for this whole outfit?

A. Well, that is taking the tender with it too, and the equipment that they had there for their anchors and chains and everything of that kind they had for raising it.

Q. I didn't understand how you made the difference.

(Testimony of William B. Honeyman.)

A. Well, we were merely talking of barges there, them two barges. In addition to that they had another barge; they had a steamer, and they had all the equipment for that raising. I think it would be a very reasonable charge, \$125.00 a day, for all that.

Cross-examination.

Questions by Mr. REED:

Mr. Honeyman, in this report I see you say that the "Kern" was built in 1879; that is correct, I suppose?

A. That is correct from the record because Captain Crowe looked that up. Now, I didn't put that down; that is Captain Crowe's, but I am satisfied that is correct, because that is a matter of record, you know; you can easily get that.

Q. Well, it is in your evidence any way?

A. Yes, sir.

Q. Do you know what power she had?

A. I couldn't say.

Q. What?

A. I couldn't say what the power was further than the register shows.

Q. You inspected the engines and the size of them and that [578] sort of thing? A. Yes.

Q. Did you form any opinion as to the power?

A. No; it was not necessary. I just wanted to get the cost of repairs, to make them the same as they were. There wasn't anything of the engine proper outside of the connections and rods, piping and cylinder covering that was broken; no cylinder broken.

(Testimony of William B. Honeyman.)

Q. About the only thing broken would be the tail shaft, you say?

A. Well, the tail shaft and couplings and bearings that there were on there; there were bolts carried away and some castings broken, and a great deal of the small connections of the engine were rusty and some of them twisted and bent and some broken.

Q. That is, aft?

A. Well, the engines are all aft, from the engines aft to the tail shaft.

Q. Now, then, in making these connections of fir to the oak, as you say, four frames forward, did you make them as far forward as the location of the damage that was done in the previous accident?

A. I know nothing about that.

Q. What?

A. There was nothing done in that portion of the vessel at all; we didn't recommend anything on that.

Q. No, I am asking you if you got that far forward?

A. We got clear forward because the ballast was right there at the forward hatch and clear up to the stem.

Q. What kind of timber was she repaired with forward on the starboard where she was hurt before?

[579]

A. I couldn't say that; I didn't examine that, see what kind of timber; was covered on the outside with copper and on the inside everything was all one color there, with mud and dirt when we made that examination.

(Testimony of William B. Honeyman.)

Q. So your examination was not sufficient to say what the condition of that side of the boat was?

A. There was nothing wrong with that side of the boat; we were only looking to see where any damage to be replaced. We were not looking at the undamaged portion of the vessel at all.

Q. You didn't assume it was undamaged; you *invested* by your eyesight?

A. We didn't see damage there, but we did see damage on the decks clear up to just aft the pilot-house.

Q. In making this investigation you didn't notice the kind of timber of framing or deck, or whatever it was on the side? A. We noticed oak inside.

Q. They repaired with oak the first time?

A. I don't know whether they did or not or whether any timbers carried away. I don't know anything about that. There is nothing in our report to indicate it.

Q. I am not talking about the report.

A. And we didn't make any examination about that, because nothing displaced there or no break that we could see. We made a very thorough examination from stem to stern.

Q. From stem to stern? A. Yes, sir.

Q. And yet you didn't notice what repairs made forward? [580]

A. Because all covered with mud; all inside, and with copper sheathing outside; nothing showing. I suppose all painted. I didn't know until I heard it here there was a break.

(Testimony of William B. Honeyman.)

Mr. CAMPBELL.—Shows how thoroughly repaired she was in the first place.

Q. What was the idea in leaving the copper off?

A. To get at the planking.

Q. How.

A. The copper had to be taken off in order to caulk the planks.

Q. Well, it was left off, I believe? A. What?

Q. Was it left off?

A. I couldn't say; I didn't see it on there. There was 11 feet—the copper extended from where—11 feet on the side, on each side.

Witness excused. [581]

**Testimony of J. E. Copeland, for Libelant
(Recalled).**

Captain J. E. COPELAND, recalled by the libelant.

Direct Examination.

Questions by WOOD:

Did you hear Mr. Ballin testify that at this time you were using the "Sampson" outside and the "Kern" inside? A. Yes, sir.

Q. Is that a fact?

A. No, sir; we were using both boats inside.

Q. Did you hear him testify that the "Sampson" had twice as much power as the "Kern"?

A. I did.

Q. What is the fact about that?

A. The fact of the matter is, the amount of steam the "Kern" carries would not give her quite so much power as the "Sampson" but her engines were larger

(Testimony of Captain J. E. Copeland.)

and with the same amount of steam she would have more power than the "Sampson."

Q. And the question of steam pressure is entirely a question of what kind of boiler you put in her, is it?

A. Yes, sir.

Q. In that towing business was the "Kern" as valuable a boat as the "Sampson"?

A. Well, I guess she was; she did the same work as the "Sampson" does, exactly the same work. Allow as much for her as allow for the "Sampson."

Q. Was there any occasion for either boat going outside? A. Not at that time.

Q. Could the "Kern" go outside if necessary?

A. Yes, sir. [582]

Cross-examination.

Questions by Mr. REED:

What was the value of the "Sampson"?

A. What was the value of that?

Mr. WOOD.—I didn't ask about that and I object to it as not cross-examination.

Mr. REED.—The question was asked if she was as valuable as the "Sampson."

A. For this work.

Mr. WOOD.—For towing work.

Q. Now, what was the value of the "Sampson"?

A. That is not the question.

Q. That is what I am asking.

A. I am not—

Mr. WOOD.—I object as not cross-examination.

COMMISSIONER.—If you are held to the rules of examination I guess you couldn't ask it.

(Testimony of Captain J. E. Copeland.)

Mr. REED.—I want to state to the Commissioner I can't imagine why it is not proper under the most strict interpretation of the law. The question was asked on direct examination what is the value of this boat and a comparison called for.

COMMISSIONER.—He was comparing the value of the boats for this purpose, not as to cost.

Mr. REED.—What I want to get at is the value of the damage; consequently what was the value of the "Sampson"?

Mr. WOOD.—I instruct the witness not to answer and will have it certified to the Court.

Mr. REED.—I know, but the Commissioner decides it, does he not? [583]

COMMISSIONER.—The Commissioner will rule that the testimony may go in under objection.

Q. Then you can state what the value of the "Sampson" was.

A. I am not a marine architect, nor a surveyor, nor a shipbuilder.

COMMISSIONER.—That settles it. He is not qualified.

Q. You don't know.

Mr. WOOD.—You can make any of these your own witnesses, but you must stick to cross-examination.

Q. The "Kern" didn't have the power of the "Sampson," though, did she?

A. Well, she did the same work the "Sampson" did. Why didn't she have the power. She did as much work as the "Sampson" done. She was doing

(Testimony of Captain J. E. Copeland.)

the "Sampson's" work, in fact, when she was sunk. She was a twenty-two and a half inch cylinder by thirty-four inch stroke. And the "Sampson" has a twenty-inch cylinder by 28 inch stroke, which would give the "Kern" the most power.

Q. The "Kern" therefore had the most power?

A. With the same amount of steam the "Sampson" carried, but the boilers, you understand, of the "Sampson" was allowed more steam than the boilers of the "Kern."

Q. Well, did the "Kern" have the power?

A. She did the same work the "Sampson" did; must have had the power.

Q. Then you say did have the same power with smaller boiler? A. No; with that smaller boiler.

Q. Why didn't she have it then?

A. She had enough power to do the "Sampson's" work; why didn't she have as much power as the "Sampson." She was doing the "Sampson's" work when she was sunk. [584]

Q. Therefore you are saying that she was fully as capable as the "Sampson" for the work she was doing?

A. Yes, she did as much work as the "Sampson" done. In fact, she was doing the "Sampson's" work when she sunk and the "Sampson" was laid up for repairs. She was doing the same work the "Sampson" had been doing for two or three years prior, three years.

Q. That was her use doing the same work as the "Sampson"? A. Yes; what we were doing.

(Testimony of Captain J. E. Copeland.)

Mr. WOOD.—And she did it quicker than the “Sampson”?

A. Yes; did it for less money.

Q. She did it quicker and had as much power, didn’t she?

A. I don’t know as she had as much power, as far as power was concerned; she had power enough to do the work.

Witness excused. [585]

**Testimony of Theodore Knudsen, for Libelant
(Recalled).**

THEODORE KNUDSEN, recalled by libelant.

Direct Examination.

Questions by Mr. CAMPBELL:

Mr. Knudsen, did you hear Mr. Ballin’s testimony about the rotten condition of the “Rochelle”?

A. I did.

Q. Who repaired the “Rochelle”? A. I did.

Q. Will you state whether or not it is true her timbers were in a rotten condition, as Mr. Ballin testified?

A. They were not rotten; they were sound.

Q. What can you say as to the durability and life of fir timber for shipbuilding purposes as compared with oak?

A. Well, I have known oak vessels to be over a hundred years old and still be sound.

Q. What can you say as to the durability or life of fir timber?

(Testimony of Theodore Knudsen.)

A. Oregon fir under ordinary conditions, about fourteen years.

Cross-examination.

Questions by Mr. REED:

How about the "Sampson"—what condition is she in?

A. I don't know, sir; I think she is in fairly good shape.

Q. Didn't Mr. Ballin say she had been built seventeen years ago?

A. Well, I don't know when she was built.

Q. Well, if it is true that she is seventeen years old and in good condition, how do you account for that if she is in good condition?

A. I don't know whether true or not. [586]

Q. Do you know what the "Alki" is made of?

A. What is the "Alki"?

Q. You don't know the "Alki"? She is a wooden boat I happen to think of, an old boat.

A. I don't know.

Mr. CAMPBELL.—How long ago was she lost?

Witness excused. [587]

Testimony of Daniel Kern, for Libelant (Recalled).

DANIEL KERN, recalled by the libelant.

Direct Examination.

Questions by Mr. WOOD:

Mr. Kern, was this copper sheathing replaced on the "Kern"? A. No, sir.

Q. Why not?

A. Because we expected to use the boat in fresh

(Testimony of Daniel Kern.)

water and we didn't consider it necessary, and if we had put it on the expense of these repairs would have been probably a thousand dollars more than they are at present.

Q. That is, it was not necessary for use in fresh water? A. Yes.

Q. If, however, you were going to use her on the outside?

A. Then you would have had to have copper sheathing or something to keep the teredos out of the hull of the boat.

Cross-examination.

Questions by Mr. REED:

There is not a boat in this country that is sheathed now, is there? A. Yes, I think there is.

Q. They never build and sheath them any more?

A. They have to keep a preservative on them, copper paint or red lead or something to keep the worms out.

Q. I know, but they don't build them that way?

A. I don't know; I never seen the boats built. I don't know how many sheathed and how many ain't.

Q. Don't you know about the "Wallula"?

A. The "Wallula"? [588]

Q. Oh, but she is steel.

A. She has a steel hull, I think.

Q. Take the old ones, take the old "Fearless," take the old "Astoria."

A. I never say the "Fearless."

Q. How is it you know so much about these boats when he asks you and don't know about it when I

(Testimony of Daniel Kern.)

ask you? A. About what?

Q. About sheathing?

A. I said the sheathing protected them down there.

Q. And was worthless when you changed the boat to use in fresh water?

A. We don't need in fresh water.

Q. So she don't go outside at all?

A. We didn't expect to use her outside when we bought her.

Q. And the rest of the mahogany and fancy finishes were just as valuable to you, valuable to the boat as that sheathing, weren't they?

A. Just as valuable; they were all valuable. If you wanted to find a market to sell the boat, it would help to sell it, to have sheathing, so it would help in selling the boat.

Q. That is the reason you took it off?

A. No; we had to take it off to find out where the leaks were in the boat and caulk the hole.

Mr. WOOD.—We will make up some of these figures in the book and meantime we won't close the testimony.

Witness excused.

Whereupon proceedings herein were adjourned until Friday, July 21, 1916. [589]

Portland, Oregon, Friday, July 21, 1916.

DANIEL KERN resumes the stand for further

Direct Examination.

Questions by Mr. WOOD:

I show you this ledger, Mr. Kern, and ask you if

(Testimony of Daniel Kern.)

that is one of the ledgers of the Columbia Contract Company? A. Yes, sir.

Q. Turn to page 80 in it, if you will. Is that the account of the "Manzanita" on page 80? A. Yes.

Q. The "Manzanita" was the former name of the "Daniel Kern," wasn't it? A. Yes.

Q. And referring to the book there, what do you carry the "Kern" at—what did you carry her at on your books on January 1, 1909?

A. \$24,081.79.

Q. How was that sum made up?

A. Under the cost of the boat plus repairs put into her, betterments.

Q. Was that the value that you placed on her?

A. No, sir; that was what we actually expended on the boat. The boat was worth in my estimation double that amount.

Q. But that twenty-four thousand represented the cost price of her plus what you put into her after you bought her? A. Yes, sir.

Q. How did the cost price of her compare with her actual value when you bought her?

A. What we paid for her, you mean? [590]

Q. Yes.

A. Well, we thought she was worth double that.

Q. Was this twenty-four thousand odd dollars that you carried her at on January 1, 1909, before or after the new boilers were put into her?

A. That was before. After the new boilers were put in we had expended on that boat \$33,604.82, but that didn't represent the value of the boat.

(Testimony of Daniel Kern.)

Q. Well, wasn't part of that expenditure of yours of thirty-three thousand, wasn't part of that operation expense?

A. No, I don't think so; the operation is not carried in this account.

Q. I notice some items of payroll and cook-house which I thought indicated that they at least were part of her operation?

A. Well, that cook-house was probably a charge against the boat for men boarding there at the time we were making these repairs, their proportion.

Mr. WOOD.—Mr. Reed, I have produced the book as per your request.

A. In 1910 we reappraised all of our property and this boat was on our books in 1910 at \$40,000.

Q. That was in connection with the reappraisal of all your property?

A. Yes, sir; not only that boat but all the properties.

Q. Was that the end or the beginning of 1910?

A. That was, I think, in the beginning of 1910. I wouldn't say as to that just what month that was in.

Q. But anyway it was the time you reappraised?

A. Yes, sir. [591]

Q. No; that couldn't have been the beginning of 1910, because the beginning of 1910 is still here.

A. It isn't in that one, is it?

Q. No; I say the beginning of 1910 is there.

A. No, I think it was later in the year.

Mr. REED.—Mr. Kern, that was after she was raised and repaired the second time?

(Testimony of Daniel Kern.)

A. That is the idea.

Mr. REED.—The new appraisal was after she was taken up, after the collision with the “Elder”?

A. Yes, but she was not as good a boat then.

Mr. REED.—I mean that was after?

A. After the time, but she was not as good a boat then as she was before.

Q. You mean, after she had been repaired from the “Elder” collision she was not as good a boat as she was? A. No.

Q. Where was this boat with reference to the ship channel, Mr. Kern?

A. Right in the ship channel; right on the ranges where the ships run.

Q. Was there any way that you could tell the extent of her damage before you raised her?

A. No, sir.

Q. Did you know or have any idea of the extent of her damage before you raised her?

A. No, sir.

Mr. WOOD.—I think that is all. [592]

Cross-examination.

Questions by Mr. REED:

Couldn't that have been done by divers in 68 feet of water?

A. No; we wouldn't make much headway digging down to get chains or anything under her.

Q. I mean the extent of the damage.

A. To be determined by diver?

Q. Yes.

(Testimony of Daniel Kern.)

A. No; how would a diver get inside the boat and find whether the shaft was bent or not, couplings broken, a boat full of mud?

Redirect Examination.

Q. I don't know whether this has been covered and I want to ask you in case it has not been: Do you know about when her repairs were finally completed?

A. After the collision?

Q. Yes.

A. I think along about the first of April.

Q. 1910? A. 1910.

Witness excused.

Libelant rests.

Claimant rests.

Filed Oct. 5, 1916. G. H. Marsh, Clerk. [593]

And afterwards, to wit, on the 5th day of December, 1916, there was duly filed in said court a Motion to Confirm Report of Special Master and to Amend Libel, in words and figures as follows, to wit: [594]

*In the District Court of the United States for the
District of Oregon.*

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corpora-
tion,

Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,

Respondent.

CHARLES P. DOE,

Claimant.

**Motion to Confirm Report of Special Master and to
Amend Libel, etc.**

Comes now the libelant and moves that the report of the referee, Mr. A. M. Cannon, in the matter of the amount of damages, be affirmed, and for a decree in conformity with said report; and further moves for permission to amend the prayer of the libel to conform to the said Referee's report, and so as to pray for damages in the sum of \$25,000.00 against the claimant and his stipulator, and for interest on said sum against the claimant alone, and for costs against the claimant and his stipulator for costs in the sum of \$250.00, and for the balance of libelant's costs against the said claimant alone.

ERSKINE WOOD,

Of Proctors for Libelant.

Due service of the within motion by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, December 5th, 1916.

SANDERSON REED,

Per B.,

Proctor for Claimant.

Filed Dec. 5, 1916. G. H. Marsh, Clerk. [595]

And afterwards, to wit, on Monday, the 11th day of December, 1916, the same being the 30th Judicial day of the regular July Term of said Court; present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [596]

In the District Court of the United States for the District of Oregon.

No. 5162.

December 11, 1916.

COLUMBIA CONTRACT COMPANY, a Corporation,
Libelant,

vs.

Steamship "GEORGE W. ELDER" Her Engines,
etc.,

Respondent.

CHARLES P. DOE,

Claimant.

**Minutes of Court—December 11, 1916—Order
Confirming Report of Special Master, etc.**

On motion of libelant IT IS ORDERED that the report of Mr. A. M. Cannon, Referee, fixing the amount of libelant's damages in the above-entitled cause at \$41,839.83, with interest thereon at six per cent per annum from the first day of May, 1910, until paid, and awarding the libelant its costs and disbursements, be and the same is hereby confirmed and approved. And it is further ordered that libelant have leave to amend its libel to conform to the amount of said damages found by the said referee, and so as to pray for damages in the sum of \$25,000.00 against the claimant and his stipulator, and for interest on said sum against the claimant alone, and for costs against the claimant and the stipulator of claimant for costs in the sum of \$250.00, and for the balance of libelant's costs against said claimant alone; and for such other and further relief as to the court may seem equitable and in accordance with the admiralty practice; and it is further ordered that a decree be prepared and submitted in conformity with said report of the commissioner and the prayer of the libel as amended.

CHAS. E. WOLVERTON.

Judge.

Filed Dec. 11, 1916. G. H. Marsh, Clerk. [597]

And afterwards to wit, on the 28th day of December, 1916, there was duly filed in said Court an Amended Libel, in words and figures as follows, to wit: [598]

In the District Court of the United States for the District of Oregon.

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corporation,
tion,

Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,

Respondent.

CHARLES P. DOE,

Claimant.

Amended Libel.

To the Honorable CHARLES E. WOLVERTON
and the Honorable ROBERT S. BEAN, Judges
of the Above-entitled court:

Columbia Contract Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, presents this its amended libel against the steamship "George W. Elder," her machinery, tackle, apparel and furniture, whereof G. M. Jessen is or lately was master and C. P. Doe and J. H. Peterson are or lately were owners, and against all persons intervening for their interests in said vessel in a cause of collision, civil

and maritime, and thereupon your orator articulately propounds and alleges as follows:

I.

At all of the times in this libel set forth libelant was and is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and at all of such times was and still is the owner of a certain screw steamship known as the "Daniel Kern," which vessel was, prior to the 18th day of August, 1909, employed by libelant [599] in the towage of barges to and from Ft. Stevens, Oregon, and points upon the Columbia River above Ft. Stevens.

II.

The "George W. Elder" is a screw steam vessel flying the American flag and heretofore was plying regularly between Portland, Oregon, and Eureka, San Francisco and San Pedro, California. Her master is or lately was G. M. Jessen, and C. P. Doe and J. H. Peterson are or lately were her owners, and said vessel was at the time of the filing of the original libel in this cause, lying in the port of Portland, Oregon, and was within and subject to the jurisdiction of this Honorable Court and was seized under the process of this court issued in this cause, and later claimed by C. P. Doe as her owner and released on an admiralty stipulation for value and to abide by and pay the decree in the sum of \$25,000.00, signed by C. P. Doe, claimant and stipulator, and The United States Fidelity & Guaranty Company, stipulator.

III.

Heretofore and about one o'clock in the morning of August 18, 1909, the "Daniel Kern" was a vessel under way in the waters of the Columbia River about abreast of Waterford, Washington, and was engaged in making fast to three loaded rock barges, also belonging to libelant, preparatory to towing them from such point to Ft. Stevens, Oregon. Said vessel was in good order and condition and was well and sufficiently manned and equipped with a full and competent set of officers and crew, and said vessel had burning and was displaying the regulation lights, to wit, her port sidelight colored red, her starboard sidelight colored green, both fitted with regulation screen and burning in the proper place; her mast [600] headlight and lights also upon her foremast indicating that she had a tow, and a white light astern burning in the accustomed place. The "Daniel Kern" engines were stopped at the time and she was making fast to her tow having a head line running at the time to the barge forming the port barge of her tow. The "Daniel Kern" was headed down the Columbia River and the barges were headed substantially at right angles to her upon her port bow and towards the Oregon shore of the Columbia River. The "George W. Elder" left Portland, Oregon, upon her regular voyage from Portland to California ports, as aforesaid, the evening of August 17, 1909, and when descending the Columbia River upon such voyage and in the vicinity of Waterford light, sighted the "Daniel Kern" ahead of herself and down the Columbia River.

Neither of the sidelights of "Daniel Kern" were visible to those in charge of the navigation of the "Elder" and the "Daniel Kern" was in such position as that her sidelights could not be so visible. The "George W. Elder" blew one short blast of her steam whistle as a signal of her desire to overtake and pass the "Daniel Kern" on the right or starboard hand of the "Daniel Kern." To such blast of the "George W. Elder" the "Daniel Kern" replied with four short and rapid blasts of her own steam whistle, the danger signal, indicating that the "Daniel Kern," by reason of the fact that she did not have her tow under control, did not think it safe for the "George W. Elder," the vessel astern, to attempt to pass at that point. To the four short and rapid blasts of the steam whistle of the "Daniel Kern" the "George W. Elder" again blew one short blast, to which the "Daniel Kern" again replied with four short and rapid blasts of her own steam whistle, and almost immediately thereafter [601] the "George W. Elder" came into collision with the "Daniel Kern," striking her upon the starboard quarter aft and inflicting such damage upon the "Daniel Kern" as that within twenty minutes thereafter she sank in the waters of the Columbia River and lay upon the bottom of the Columbia River.

IV.

The libelant avers that said collision was occasioned solely through negligence and carelessness of those in charge of the navigation of the "George W. Elder" in that she did not keep out of the way

of the "Daniel Kern" and attempted to pass the "Daniel Kern" from astern without receiving the assent of the "Daniel Kern" indicated by the appropriate whistle so to do and attempted so to pass when the "Daniel Kern" had blown four short and rapid blasts of her steam whistle indicating that it was not safe for the "George W. Elder" to attempt to pass at that point; and libelant further avers that no act of the "Daniel Kern," her master, pilot, officers or crew in any respect whatever contributed to said collision.

V.

By reason of said collision so occasioned by the negligence and carelessness of those in charge of the "George W. Elder," libelant, as owner of the "Daniel Kern," has sustained damages in and about the raising and repair of said vessel and loss of equipment upon said vessel and loss of the use of said vessel in the sum of \$41,839.83, with interest thereon from the 10th day of May, 1910, until paid.

VI.

All and singular the above premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.
[602]

WHEREFORE, libelant prays for a decree fixing and assessing the libelant's damages at the sum of \$41,839.83, together with interest thereon at six per cent per annum from the first day of May, 1910, and decreeing that libelant shall have and recover from the said Charles P. Doe and the said United States Fidelity & Guaranty Company, stipulators, the sum

of \$25,000.00, and that the libelant shall further have and recover from the said Charles P. Doe, owner and claimant of the said "George W. Elder," interest upon said sum of \$25,000.00 from the first day of May, 1910, until the date of the decree; and further decreeing that libelant shall have and recover of the said Charles P. Doe and Harry Young, stipulators on claimant's stipulation for costs, the sum of \$250.00 being a portion of libelant's costs and disbursements, and that libelant shall further have and recover of said Charles P. Doe the sum of \$ ———, being the balance of libelant's costs and disbursements; and further decreeing that the said decree shall bear interest from its date at the rate of six per cent per annum; and further decreeing that execution issue against the goods, chattels and lands of the said claimant and of the said stipulators to enforce said decree; and for such other, further and different relief as to the court may seem just and equitable and in accordance with the practice in admiralty.

IRA A. CAMPBELL,
ERSKINE WOOD,

Proctors for Libelant. [603]

United States of America,
State and District of Oregon,—ss.

I, Daniel Kern, being first duly sworn, on oath say that I am the president of the libelant above named, and the foregoing libel is true as I verily believe.

DANIEL KERN.

Subscribed and sworn to before me this 14th day of December, 1916.

[Notarial Seal]

M. COLPITTS,

Notary Public for Oregon.

My commission expires Jan. 21, 1917.

Due service of the within amended libel by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, December 28, 1916.

SAND. REED,

Attorney for Claimant.

Filed Dec. 28, 1916. G. H. Marsh, Clerk. [604]

And afterwards, to wit, on Thursday, the 28th day of December 1916, the same being the 45th judicial day of the regular November, 1916, term of said Court; present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [605]

In the District Court of the United States for the District of Oregon.

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corporation,

Libellant,

vs.

Steamship "GEORGE W. ELDER," Her Engines, etc.,

Respondent.

CHARLES P. DOE,

Claimant.

Decree.

This cause having come on to be heard before the District Court of the United States for the District of Oregon on the 5th day of February, 1912, on the question of liability, and the Court having found that the "George W. Elder" was solely at fault for the collision with the "Daniel Kern" and having directed that a reference be had to Mr. A. M. Cannon to hear testimony upon and compute the amount of the libelant's damages arising out of said collision, and the said referee having filed his report in this court on the 5th day of October, 1916, finding that the amount of the said damages is forty-one thousand eight hundred thirty-nine and 83/100 (41,839.83) dollars, with interest thereon at six (6) per cent per annum from the first day of May, 1910, until paid, together with libelant's costs and disbursements;

And it appearing that an admiralty stipulation in the sum of twenty-five thousand (25,000) dollars was given in this cause for the release of the said steamship "George W. Elder" and to abide by and satisfy the decree of this court, the stipulators thereon being Charles P. Doe, the owner of said [606] steamship "George W. Elder," and the United States Fidelity & Guaranty Company;

And it further appearing that a stipulation for costs in the sum of two hundred and fifty (250) dollars was filed in this cause, the stipulators thereon being the said Charles P. Doe and Harry Young:

And it also appearing that the said Charles P. Doe appeared as owner of the said steamship "George W.

Elder'' and by answer has admitted the ownership of said vessel at the time of said collision and has defended in this cause and has contested and resisted libelant's demands;

NOW, THEREFORE, the Court being fully advised in the premises, and upon motion of proctors for libelant, said referee's report is hereby approved and confirmed in every particuular, and the damages of the libelant are hereby assessed at the sum of forty-one thousand eight hundred thirty-nine and 83/100 (41,839.83) dollars, with interest at six (6) per cent thereon from the first day of May, 1910, until paid;

AND IT IS ORDERED AND DECREED that the said libelant, Columbia Contract Company, shall have and recover from the said Charles P. Doe and the said The United States Fidelity & Guaranty Company, stipulators, the sum of twenty-five thousand (25,000) dollars; and that the said libelant shall further have and recover of the said Charles P. Doe, owner and claimant of said steamer "George W. Elder," interest at the rate of six per cent per annum upon the said sum of twenty-five thousand (25,000) dollars from the first day of May, 1910, until the date of this decree, to wit, nine thousand nine hundred ninety-one and 65/100 dollars; and shall further have and recover of the said Charles P. Doe and said Harry Young the sum of two [607] hundred and fifty (250) dollars, being a portion of libelant's costs and disbursements; and shall further have and recover of said Charles P. Doe the sum of three hundred

twenty-five 63/100 dollars, being the balance of libellant's costs and disbursements.

AND IT IS FURTHER ORDERED AND DECREED that this decree shall bear interest from its date at the rate of six (6) per cent per annum.

AND IT IS FURTHER ORDERED AND DECREED that execution issue against the goods, chattels and lands of the claimant and of the said stipulators to enforce this decree.

CHAS. E. WOLVERTON,
Judge.

Dated Dec. 28th, 1916.

Copy served 12/28/16.

SANDERSON REED,
Proctor for Resp.

Filed Dec. 28, 1916. G. H. Marsh, Clerk. [608]

And afterwards, to wit, on the 21st day of June, 1917,
there was duly filed in said court a Notice of Appeal, in words and figures as follows, to wit:
[609]

*In the District Court of the United States for the
District of Oregon.*

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corporation,
Libellant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,
Respondent,

CHARLES P. DOE,

Claimant.

Notice of Appeal.

You and each of you will please take notice that Charles P. Doe, claimant in the above-entitled suit, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the decree in the above-entitled suit, entered on the 28th day of December, 1916, whereby it is ordered and decreed that the libelant, Columbia Contract Company, recover from Charles P. Doe and the United States Fidelity and Guaranty Company, stipulators, the sum of twenty-five thousand (\$25,000.00) dollars, and that the said libelant shall further have and recover from the said Charles P. Doe, claimant, interest upon said sum of twenty-five thousand (\$25,000.00) dollars, from the 1st day of May, 1910, until the date of said decree, to wit, nine thousand nine hundred ninety-one and 60/100; and further recover from the said Charles P. Doe and Harry Young, the sum of two hundred and fifty (\$250.00) dollars, being a portion of the libelant's costs and disbursements, and further recover from the said Charles P. Doe the [610] sum of —— (\$——) dollars, being the balance of libelant's costs and disbursements, and further that the decree bear interest at the rate of six (6%) per cent per annum, and further order exception against claimant and the said stipulators.

SANDERSON REED,

Proctor for Charles P. Doe, Claimant and Appellant.

State of Oregon,

County of Multnomah,—ss.

Due service of the foregoing notice of appeal by

copy, as prescribed by rules of Court, is hereby admitted at Portland, Oregon, this 21st day of June, 1917.

ERSKINE WOOD,
Proctor for Libelant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within notice of appeal is hereby accepted in Mult. County, this 21 day of June, 1917, by receiving a copy thereof, duly certified to as such by Sanderson Reed, proctor for claimant.

ERSKINE WOOD,
Of Proctors for Libellant.

Filed June 21, 1917. G. H. Marsh, Clerk. [611]

And afterwards, to wit, on the 12th day of October, 1917, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to wit: [612]

*In the District Court of the United States for the
District of Oregon.*

COLUMBIA CONTRACT COMPANY, a Corpora-
tion,

Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,

Respondent.

CHARLES P. DOE,

Claimant.

Assignments of Error.

The claimant and appellant, Chas. P. Doe, assigns as error on appeal herein:

I.

Error of the Court in finding and decreeing that the steamship "Geo. W. Elder" was liable and responsible to the libelant to whatsoever damages the "Kern" sustained.

II.

Error of the Court in finding the damages to the libelant and assessing the same in any sum in excess of twenty-five thousand (\$25,000.00) dollars.

III.

Error of the Court in making and entering a decree that the libelant, Columbia Contract Company, shall have and recover from Chas. P. Doe and the United States Fidelity and Guaranty Company, Stipulators, the sum of twenty-five thousand (\$25,000.00) dollars; and the further sum of interest at six (6%) per cent per annum upon said twenty-five thousand (\$25,000.00) dollars from the first day of May, 1910, until the date of the decree herein; and the further sum of two hundred and fifty (\$250.00) dollars as a portion of libelant's costs and disbursements; and the further sum of—costs and disbursements, or any sum whatever. [613]

IV.

Error of the Court in giving and entering a decree in any sum against the claimant in favor of the libelant herein.

SANDERSON REED.

Proctor for the Claimant, Chas. P. Doe.

Filed October 12, 1917. G. H. Marsh, Clerk.
[614]

And afterwards, to wit, on Friday, the 12th day of October, 1917, the same being the 88th judicial day of the regular July Term of said court; present, the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [615]

*In the District Court of the United States for the
District of Oregon.*

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corporation,
Libelant,

vs.

Steamship "GEORGE W. ELDER," Her Engines,
etc.,
Respondent.

CHARLES P. DOE,

Claimant.

Minutes of Court—October 12, 1917—Order Directing Transmission of Original Exhibits to Appellate Court.

This cause coming on to be heard, on motion of the claimant and appellant, Chas. P. Doe, that the original exhibits herein be forwarded to the clerk of the Circuit Court of Appeals at San Francisco with the Apostles on Appeal herein, the claimant being rep-

resented by Sanderson Reed as his proctor, and the libelant being represented by ————— as his proctor, and the Court being fully advised in the premises,—

IT IS ORDERED that the clerk be and he is hereby directed to forward to San Francisco to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the original exhibits herein with the Apostles on Appeal herein.

Portland, Oregon, October 12, 1917.

R. S. BEAN,
Judge.

Filed October 12, 1917. G. H. Marsh, Clerk. [616]

And afterwards, to wit, on the 22d day of October, 1917, there was duly filed in said court a Prae-
cipe for Apostles on Appeal, in words and fig-
ures as follows, to wit: [617]

*In the District Court of the United States, for the
District of Oregon.*

The Steamship "GEORGE W. ELDER," Her
Machinery, Tackle, Furniture, etc.

COLUMBIA CONTRACT COMPANY,
Libelant.

CHARLES P. DOE,
Claimant.

**Prae-
cipe for Apostles on Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare Apostles on Appeal in the above-entitled cause and include therein from the record of said cause the following papers:

Libel.

Answer of Claimant.

Findings of the Court Entered February 3, 1913.

Opinion of the Court.

Testimony Taken Before the Court.

**Order Appointing A. M. Cannon Commissioner to
Ascertain the Amount of Damage.**

Report of Commissioner.

Testimony Taken Before the Commissioner.

**Motion Filed December 5, 1916, to Confirm Report
of Commissioner and to Amend Libel.**

**Order of December 11, 1916, to Affirm Report of
Commissioner and to File Amended Libel.**

Amended Libel.

Final Decree.

Notice of Appeal.

Assignment of Errors.

**Order to Send Original Exhibits to the Court of
Appeals.**

SANDERSON REED,

Proctor for Claimant.

Filed October 22, 1917. G. H. Marsh, Clerk. [618]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 618, inclusive, constitute the Apostles on Appeal in the cause in said court of The Steamship "George

W. Elder," Her Machinery, Tackle, Apparel, and Furniture, The Columbia Contract Company, Libellant and Appellee; Charles P. Doe, Claimant and Appellant; that the said Apostles contain the caption, and a full, true and correct transcript of the record and proceedings had in said court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the rules of court and the praeipe of the appellant.

And I further certify that the cost of the foregoing Apostles is \$174.30, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland in said District this 23d day of October, 1917.

[Seal]

G. H. MARSH,
Clerk. [619]

[Endorsed]: No. 3073. United States Circuit Court of Appeals for the Ninth Circuit. Charles P. Doe, Claimant of the Steamship "George W. Elder," Her Engines, etc., Appellant, vs. Columbia Contract Company, a Corporation, and United States Fidelity and Guaranty Company, Stipulators, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed October 29, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States, for the
District of Oregon.*

No. 5162.

COLUMBIA CONTRACT COMPANY, a Corpora-
tion,

Libelant,

vs.

Steamship "GEO. W. ELDER," Her Engines,
Apparel, etc.,

Respondent.

CHAS. P. DOE,

Claimant.

**Order Enlarging Time to and Including November 1,
1917, to File Apostles on Appeal.**

Based upon the application of Chas. P. Doe, claim-
ant and appellant herein, appearing by Sanderson
Reed, libelant appearing by M. M. Matthiessen,
Esq.,—

IT IS ORDERED that the time in which apostles
on appeal may be filed herein is hereby extended to
and including the first day of November, 1917.

CHAS. E. WOLVERTON,

Judge.

August 16th, 1917.

[Endorsed]: 5162. 13,135. Columbia Contract
Co., Libelant, vs. S. S. "Elder," etc., Respondent.
Chas. P. Doe, Claimant. Order Extending Time in
Which to File Apostles on Appeal.

No. 3073. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to November 1, 1917, to File Record Thereof and to Docket Case. Filed Oct. 27, 1917. F. D. Monckton, Clerk. Refiled Oct. 29, 1917. F. D. Monckton, Clerk.



